# THE CHAIRMAN'S REPORT ON A REVIEW OF THE MISSOURI PUBLIC SERVICE COMMISSION'S STANDARD OF CONDUCT RULES AND CONFLICTS OF INTEREST STATUTE

**Case No. AO-2008-0192**

**Chairman Jeff Davis**
**Missouri Public Service Commission**

**January 15, 2008**

**Harold Stearley, Regulatory Law Judge**
**Mark Hughes, Chief of Staff**
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| In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute | ) ) ) | **Case No. AO-2008-0192** |

## REPORT OF REVIEW AND INQUIRY

**Issue Date: January 15, 2008**

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# EXECUTIVE SUMMARY

Under the investigatory power conferred in Section 386.130, RSMo 2000, the Chairman of the Missouri Public Service Commission, the Honorable Jeff Davis, opened a workshop case to conduct a thorough inquiry and review of the Commission's Standard of Conduct Rules and the Conflicts of Interest Statute. In this Report, Chairman Davis reviews the relevant Commission Rules, State Statutes and Commission Policies regarding the professional standard of conduct for the Commissioners and the Commission's staff and employees. Chairman Davis also discusses his views concerning the various comments, suggestions and proposals to enhance the effectiveness of those standards and practices, which were submitted by interested persons, groups and entities participating in the public forum established to receive them. Chairman Davis makes the following preliminary observations:

1. Citizens served by the Missouri Public Service Commission must enjoy the certainty and confidence that rates for utility services are just and reasonable, and also that processes both during and prior to the filings of cases are handled in a manner that is fair, objective and above reproach.

2. Current laws and regulations speak clearly to communications involving parties to cases before the Commission once those cases are filed and set for hearing.

3. The foremost objective of this docket is to bring a similar and unimpeachable level of confidence to communication occurring before cases are filed, and to do so in ways that maintain the essential and compelling need for Commissioners to be fully versed on issues that come before them by the free and effective exchanges of ideas, issues and concerns

with citizens, ratepayers, interest groups, regulated industries, staff, state lawmakers and other public officials.

4. Effectively meeting this challenge will serve two essential and fundamental purposes:

First, the citizens of Missouri will have comfort and assurance in the understanding that all processes, communication and actions involving the Public Service Commission and others in this state *prior to the filing of any case* serves first the best interest of citizens, and such communication and action is conducted solely in the interest of benefiting the citizens of this state, and;

Second, that the integrity and efficiency of the formal processes of regulatory hearings and dockets through which cases are filed and rates established will be resistant to distraction or compromise by questions regarding communications *prior* to or during the filing of any case. Cases involving the ratemaking process are complex by nature, and ratepayers are best served by the determination of all Commissioners in findings of fact and conclusions of law. The best interest of no party is served by confusion or questions involving communication that occurred before the filing of any case -- communication that is not only allowed, but encouraged by the statutes of Missouri.

5. To that end, I, as Chairman of the Commission, have: (a) thoroughly reviewed and analyzed the existing law governing communications between the Commissioners and any entities, persons, or interested groups, (b) invited, reviewed and given due consideration to the testimony and presentations of all participants to this docket, and, (c) prepared and now present numerous recommendations for action by the Commission that are delineated, in detail, in the Chairman's Recommendation section of this Report. Those

recommendations, appearing on pages 55 through 62 of this Report, include new requirements for scheduling meetings with the Commissioners, new notice and records requirements, ethics training for Commission employees and attorneys practicing before the Commission and Commissioner affirmations of proper participation in cases.

# REPORT OF REVIEW AND INQUIRY

## Procedural History

### Background

On December 13, 2007, out of the desire to affirm the public trust and confidence in the execution of the Missouri Public Service Commission's statutory mandates to promote the public interest, ensure the safe and adequate provision of utility services, and set just and reasonable rates for those services, the Honorable Jeff Davis, Chairman of the Commission, upon his own motion and authority, opened a workshop docket and set a Roundtable Discussion to consider potential enhancement of its Standard of Conduct Rules and Conflicts of Interest policies. The Chairman utilized this forum to review and evaluate the Commission's Standard of Conduct Rules, 4 CSR 240-4.010 et. seq., the Conflicts of Interest Statute, Section 386.200, RSMo 2000, and the Commission's current policies, procedures and practices to determine if modifications were required to prevent any impropriety, or even the appearance of impropriety, with regard to the actions of the Commission.

### Notice

All interested persons, and especially groups and entities that routinely practice before the Commission, were invited to submit comments and make presentations at the Roundtable. The Commission's Data Center was directed to electronically serve notice

upon every Commission regulated utility, the Office of the Public Counsel and every member on the Commission's Listserve. The Commission's Public Information Officer was directed to post a press release on the Commission's web page announcing the opening of this docket and the date for the Roundtable Discussion. A total of nine notices were issued in this docket prior to the date of the Roundtable, to ensure that adequate notice was provided and to assist potential participants by providing them with copies of the relevant Commission Rules, State Statutes and Judicial Canons.

**Roundtable Discussion**

The Chairman scheduled the Roundtable Discussion to be held on January 7, 2008. In order to facilitate the orderly flow of information, the Chairman requested, but did not mandate, that any interested persons, groups and entities wishing to participate in the Roundtable file prepared statements, comments, and presentation materials, as well as an estimated amount of time necessary for each presentation. Instructions for pre-filed materials included: (1) the filing of a summary section providing a concise description of the comments, suggestions, proposals, etc; and, (2) dividing the comments, suggestions, proposals into the following categories: (a) actions the Commission can implement informally; (b) actions requiring formal Commission action, i.e. rulemaking; and (c) recommended statutory changes. All prepared statements, comments, proposals, etc. were to be filed no later than January 3, 2008, to allow all participants an opportunity to review them prior to the Roundtable.

The Roundtable Discussion was held on the record, videotaped and Webcast. Prior to the Roundtable, the Missouri Energy Development Association, Ms. Julie Noonan, and the Commission's Staff filed statements, comments, and/or presentation materials. At the Roundtable, Mr. Scott Hempling, the Executive Director of the National Regulatory

Research Institute, provided written comments outlining his formal presentation.

Forty-one interested persons, groups and entities signed the attendance sheet at Roundtable Discussion; however, many news media personnel were also present, and others may not have signed in.[1] Suffice it to say, there was a large crowd present for the Roundtable. The Chairman welcomed prepared presentations from:

(1) Scott Hempling, Executive Director of the National Regulatory Research Institute;

(2) Lewis Mills, Public Counsel, The Office of the Public Counsel;

(3) Paul A. Boudreau, Legal Counsel for the Missouri Energy Development Association;

(4) Julie Noonan, Missouri Citizen and Member of StopAquila.org; and,

(5) Kevin Thompson, General Counsel for the Missouri Public Service Commission.

These presenters accepted questions from all persons in attendance. Additionally, the floor was opened to all persons in attendance to receive comments, suggestions, and even unplanned presentations.[2] Participants, and all persons viewing the Webcast, were invited to submit additional comments, either by direct filing in this docket, or by use of the Commission's web page links for filing comments.

The docket in this matter is being held open for further comments and filings, and the Chairman anticipates there will be a supplemental report filed once all comments are received and the docket is finally closed. The Chairman has included all current filings by the participants in the Roundtable as exhibits to this Report.[3]

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[1] Roundtable Exhibit 12, Appendix C.

[2] See Transcript, Volume 1, filed in Docket Number AO-2008-0192 on January 9, 2008.

[3] See Appendix C.

## The Current State of Missouri Law

While this docket was opened to review the Commission's rules and regulations pertaining to Standards of Conduct and Conflicts of Interest, the Chairman notes the primary focus of this investigation will be a review of what constitutes proper and improper *ex parte* contacts and other external communications with the Commissioners.[4] Indeed, both the Commission's Conflict of Interest Statute (Section 386.200, RSMo 2000), concerning offerings of, or solicitation of, an office, place, position or employment, and the Commission's Rule on Gratuities (4 CSR 240-4.010), concerning the offering of, or solicitation of, gifts, meals, gratuities, goods, services or travel, are very straightforward in terms of what types of contacts are expressly prohibited, regardless if they were made *ex parte* or on the record and in full view of the public. Consequently, it is expedient for this investigation to dedicate the bulk of its review to the examination of what constitutes *ex parte* contact versus other types of communications. In particular, the Chairman will examine what *ex parte* and other types of communications are allowed, authorized and acceptable, and what *ex parte* and other types of communications are improper, impermissible and prohibited.

[4] This is not a contested case, but rather a workshop case opened for the purpose of receiving comments from the public, the public utility industry as a whole and any other interested entities with regard to the Commission's Standard of Conduct policies and procedures. Consequently, this case is not subject to the same standard applied in contested cases requiring there be findings of fact that are sufficiently definite and certain or specific under the circumstances of the particular case to enable a reviewing court to review the Commission's conclusions of law and its final decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence. *Glasnapp v. State Banking Bd.,* 545 S.W.2d 382, 387 (Mo. App. 1976), *quoting* 2 Am.Jur.2d *Administrative Law* § 455, at 268). The Chairman opened this docket to accept suggestions for enhancing the Commission's current Standard of Conduct Rules, policies, procedures and practices. Implementation of any recommendations calling for legislative action is dependent upon the General Assembly. The Commission is bound to follow the proscribed procedures as currently enacted by the legislature and shall do so until such time as the legislature amends or abrogates its current directives to the Commission.

This is not to say that the Chairman, or the Commission, in any way approves of an improper contact or offer of a gratuity in any form that could occur in the presence of all parties to a matter, or during a time when no pending matter is before the Commission, and thus not fall under the category of being an *ex parte* contact. Rather, the Chairman is merely attempting to promote administrative economy by directing this inquiry to the types of conduct that require public illumination to promote the utmost public confidence in the proceedings occurring before the agency. It is not what happens in the open corridors of the Agency or the public hearing room that creates fear or undermines the process, but rather, closed door dealings involving the promise of privilege or favor that erodes the public trust. Transparency is the cornerstone of public trust.

## *Ex Parte* Contact As It Relates To Procedural Due Process

The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.[5] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.[6] The Commission, however, acts in different capacities, and consequently, not all cases ongoing before the Commission involve adverse parties or involve the determination of individual rights, i.e. cases that would implicate procedural due process protections and bar improper *ex parte* contacts.

"When the Commission . . . promulgates for prospective effect a standard addressed to the public or regulated industry generally, it acts like a lawmaker, and so exercises quasi-

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[5] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 -920 (Mo. App. 2003); *Union Elec. Co. v. Pub. Serv. Comm'n,* 591 S.W.2d 134, 137 (Mo. App. 1979).

[6] *Thompson*, 100 S.W.3d at 919 -920; *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. 1990) (citing *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)).

legislative power."[7] "When the Commission determines facts from disparate evidence and applies the law to come to decision in a particular controversy, it acts as an adjudicator, and so exercises quasi-judicial power."[8]

"Quasi-judicial is a term applied to the action of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."[9] The Commission's quasi-judicial power is exercised in "contested cases," meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.[10] It is only when the Commission exercises its quasi-judicial power that full procedural due process protections come into play.[11] As best articulated by the Missouri

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[7] *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 465 (Mo. App. 1983) (Shangler, J., dissenting) (citing *Missouri Southern R. Co. v. Public Service Commission*, 279 Mo. 484, 214 S.W. 379, 380 (1919)). See also *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo*., 2001 WL 1806001, 9 (Mo. App. 2001) (superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo*., 103 S.W.3d 753 (Mo banc 2003)).

[8] *Gulf Transport Co.*, 658 S.W.2d at 465 (Shangler, J., dissenting) (citing *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75[10, 11] (Mo. banc 1982); *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 770, 89 S.Ct. 1426, 1432, 22 L.Ed.2d 709 (1969)). See also *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo*., 2001 WL 1806001, 9 (Mo. App. 2001) (superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State of Mo*., 103 S.W.3d 753 (Mo banc 2003)).

[9] *State ex rel. McNary v. Hais*, 670 S.W.2d 494, 496 (Mo. banc 1984) (citing to *Black's Law Dictionary* 1121 (5th ed. 1979); *State ex rel. State Highway Commission v. Weinstein,* 322 S.W.2d 778, 784 (Mo. banc 1959); 1 Am.Jur.2d *Administrative Law* § 161 (1962); 50 C.J.S. *Judicial* 562-65 (1947)). It should be noted that constitutional challenges to the delegation of judicial power to administrative agencies have repetitively failed. See *Percy Kent Bag Co. v, Missouri Com'n on Human Rights*, 632 S.W.2d 480 (Mo. banc 1982).

[10] Section 536.010(4), RSMo 2000. An agency decision which acts on a specific set of accrued facts and concludes only them is an Adjudication. *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979) (citing *Ackerman v. City of Creve Coeur*, 553 S.W.2d 490, 492(2) (Mo. App. 1977)).

[11] "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). The PSC is not obligated to provide evidentiary procedures at rulemaking hearings other than providing the opportunity to "present evidence." Cross-examination of witnesses and the presentation of rebuttal evidence-are procedures employed in contested cases but not rulemaking hearings. *State ex rel.*

Supreme Court in *Jamison v. State, Dept. of Social Services, Div. of Family Services*:

> The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty or property without due process of law. The United States Supreme Court has long recognized that this prohibition "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." In determining what process is due in a particular case, a court first determines whether the plaintiff has been deprived of a constitutionally protected liberty or property interest. If so, a court then examines whether the procedures attendant upon the deprivation of that interest were constitutionally sufficient.
>
> Under both the federal and state constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" This does not mean that the same type of process is required in every instance; rather, "due process is flexible and calls for such procedural protections as the particular situation demands." Three factors must be considered in determining what procedures are constitutionally sufficient:
>
> [1] First, the private interest that will be affected by the official action; [2] second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> The United States Supreme Court has consistently held "that some form of hearing is required before an individual is finally deprived of a [protectable] interest" because "the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society.'" When this hearing must be held and what procedural protections must accompany this hearing will vary depending on the interest at stake. (Citations omitted).[12]

The Court further, and most importantly, stated: "Due process requires an impartial decisionmaker, but it also presumes the honesty and impartiality of decision makers in the

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*Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759 -760 (Mo. banc 2003). See also Section 386.250(6).

[12] *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 -406 (Mo. banc 2007) (internal citations omitted). Missouri's due process provision parallels its federal counterpart, and the Missouri Supreme Court has treated the state and federal due process clauses as equivalent. Const. amend. XIV, sec. 1; Mo. Const. art. I, sec. 10. *See also, State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996) (Missouri constitutional provisions cannot provide less protection than comparable federal ones); *Belton v. Bd. of Police Comm'rs,* 708 S.W.2d 131, 135 (Mo. banc 1986) (equivalent).

absence of a contrary showing."[13]

Thus, administrative decisionmakers must be impartial.[14] Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them.[15] A presumption exists that administrative decisionmakers act honestly and impartially, and a party challenging the partiality of the decisionmaker has the burden to overcome that presumption.[16] A judge or administrative decisionmaker is without jurisdiction, and a writ of prohibition would lie, if the judge or decisionmaker failed to disqualify himself on proper application.[17]

"Administrative decisionmakers *are expected to have* preconceived notions concerning policy issues within the scope of their agency's expertise."[18] "Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances."[19] An

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[13] *Jamison*, 218 S.W.3d at 413 (internal citation omitted). See also *Mueller v. Ruddy,* 617 S.W.2d 466, 475 (Mo. Ct. App. 1981); *Fitzgerald,* 796 S.W.2d at 59. Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S. Ct. 1665, 1670 (U.S. Cal. 1982), *E.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980). "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Id*.; *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

[14] *Id.*

[15] *Thompson*, 100 S.W.3d at 919-920; *Union Elec. Co.,* 591 S.W.2d at 137.

[16] *Thompson*, 100 S.W.3d at 919-920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[17] *Thompson*, 100 S.W.3d at 919-920; *State ex rel. Ladlee v. Aiken,* 46 S.W.3d 676, 678 (Mo. App. 2001); *State ex rel. White v. Shinn,* 903 S.W.2d 194, 196 (Mo. App.1995).

[18] *Fitzgerald*, 796 S.W.2d at 59 (emphasis added) (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.,* 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

[19] *Fitzgerald*, 796 S.W.2d at 59 (internal citations, quotation marks, and brackets omitted) (citing *Wilson v.*

administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[20] "Conversely, any administrative decisionmaker who has made an **unalterable prejudgment of operative adjudicative facts is considered biased**."[21] "Because of the risk that a biased decisionmaker may influence other, impartial adjudicators, the participation of such a decisionmaker in an administrative hearing generally violates due process, even if his [or her] vote is not essential to the administrative decision."[22]

**Inappropriate *Ex Parte* Contact**

Black's Law Dictionary defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only."[23] In order for a contact or action to be associated with one party, there must obviously be a "party" to an action, and there must be an action or case pending. Any contact or communication with an individual, group or entity when there is no existing case, by definition, is not an *ex parte* contact.

Not all ex parte contacts are prohibited or inappropriate. Indeed, even in the context of judicial officers, where such matters are typically litigated, "[t]he mere opportunity to receive information outside the courtroom which has the potential to affect considerations in

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*Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir. 1973)); *Hortonvillet,* 96 S.Ct. at 2314.

[20] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984) (administrative hearing not unfair absent a record showing that the decisionmaker "heard the evidence with an unbendable or preconceived notion" of the ultimate outcome); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986) (no unfairness unless the administrative decisionmaker "is prejudiced, so that it has predetermined to reach a particular result no matter what the evidence").

[21] *Fitzgerald*, 796 S.W.2d at 59 (emphasis added).

[22] *Fitzgerald*, 796 S.W.2d at 59 (citing *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 598 (Mo. App. 1987)).

[23] *Black's Law Dictionary*, 6th Ed., West Publishing Company, 1990, p. 576.

a case is no basis to require a judge to disqualify himself."[24] "If the record discloses an opportunity to obtain information that would disqualify the judge, it may also disclose facts that negate any reasonable question concerning the trial judge's impartiality."[25] Communications relating only to procedural matters, absent any discussion of the merits of a case, especially in light of no suggestion to the contrary, serve to dispel any further question of impropriety.[26]

Commission Rule 4 CSR 240-4.020(4) generally defines what constitutes improper ex parte contact and it provides that once an on-the-record proceeding is set for hearing:

> It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding.[27]

An on-the-record proceeding is defined as a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing, and the prohibition on improper *ex parte* contact is in effect until the proceeding is terminated by final order of the Commission.[28]

Commission Rules 4 CSR 240-4.020(1) and (2) provide specific prohibitions for attorneys with regard to communications that could interfere with a fair hearing, however, generally speaking those communications fall under the same restrains of subsection 4's

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[24] *VonSande v. VonSande*, 858 S.W.2d 233, 237 (Mo. App. 1993); *J & H Gibbar Const. Co., Inc. v. Adams,* 750 S.W.2d 580, 583 (Mo. App. 1988); *Berry v. Berry,* 654 S.W.2d 155, 159 (Mo. App. 1983).

[25] *Id*.

[26] *Id*.

[27] Commission Rule 4 CSR 240-4.020(4) & (7). It should be noted that even the Commission's advisory staff is subject to any applicable *ex parte* or conflict of interest rule requirements to the same degree as any Commissioner. See RSMo Section 386.135.6

[28] Commission Rule 4 CSR 240-4.020(7).

dictate that no communication shall be made in attempt to influence the judgment of the Commission.

The Commission's decisions are subject to judicial review.[29] The scope of judicial review of an administrative determination includes an inquiry into whether the agency decision "[i]s made upon unlawful procedure or without a fair trial."[30] Any party alleging that improper *ex parte* communications have violated their right to full procedural due process or that such communications have rendered the Commission's decision unlawful because of bias or because that party believes the case has been pre-judged, has the burden to overcome the legal presumption that decisions rendered by an administrative body are valid.[31] Any proper party alleging unfairness in the proceedings relating to *ex parte* communications, even if the communications were improper, must demonstrate that there was improper influence on the adjudicatory processes of a given Commissioner or of the Commission *en banc*.[32] An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[33] Absent such evidence, a reviewing court will not reverse the agency's decision.[34]

**Section 386.210 –Inappropriate v. Authorized Communications**

Section 386.210, RSMo Cum. Supp. 2006, which became effective in 2003, is very comprehensive and self-explanatory with regard to what communications it authorizes for

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[29] See Sections 386.510 and 386.540, RSMo 2000.

[30] Section 536.140.2(5), RSMo 2000.

[31] *Mueller,* 617 S.W.2d at 475; *Moore v. Bd. of Educ. of Special School Dist*., 547 S.W.2d 188, 191-192 (Mo. App. 1977).

[32] *Id*.

[33] *Ross*, 662 S.W.2d at 260; *Shepard,* 718 S.W.2d at 199. See n. 20, *supra*.

the Commissioners. The restrictions delineated in the statue that apply to a Commissioner's discussion of public business depend upon which type of governmental authority is involved and upon (1) what the discussion is about, (2) who the Commissioner is talking to, (3) where the discussion occurs, and (4) when the discussion occurs. To summarize: [35]

> **Section § 386.210** distinguishes between the types of communications that are authorized in matters that are the subject of a pending case and matters that are not. The net result is five sets of rules, as follows:
>
> **(A) Matters that are not the subject of a pending case**
>
> (1) The Commission, or any member thereof, may confer freely with any person or entity, in any location. (Section 386.210.1 and .2).
>
> **(B) Matters that are the subject of a pending case in which no evidentiary hearing has been set**
>
> The Commission, or any member thereof, may confer with any person or entity, concerning **procedural or substantive** issues, so long as the communication is: (Section 386.210.3).
>
> (i) at an Agenda session where prior notice that the case will be discussed has been given;
>
> (ii) at a "forum" where all parties are present; or
>
> (iii) any other place or time and is filed in the case file and served on all parties no later than the next following business day.
>
> **(C) Matters that are the subject of a pending case in which an evidentiary hearing has been set**
>
> The Commission, or any member thereof, may discuss in a public Agenda meeting with parties to a case any **procedural** matter or any matter relating to a **unanimous stipulation or agreement resolving all of the issues** in such case. (Section 386.210.5).

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[34] *Mueller*, 617 S.W.2d at 475; *Moore*, 547 S.W.2d at 191-192.

[35] The full texts of the relevant statutes and Commission rules have been placed in the Appendix to this report. The Chairman has included the full gamut of statutes that place restrictions on state officers and employees in Appendix A.

**(D) Discussions with Members of the General Assembly and other Governmental Officials**

The Commission, and any member thereof, may advise legislators and other government officials as to the issues and factual allegations in a pending case, so long as the Commission or Commissioner does not express an opinion as to the merits of the case. (Section 386.210.5).

**(E) Discussions Concerning General Regulatory Policy**

The Commission, and any member thereof, is always free to discuss, with any person, "general regulatory policy," even if the policy is implicated in a pending case, so long as the merits of any pending case are not discussed. (Section 386.210.4).

**Quasi-Judicial Officers and the Judicial Canons**

A "public office" is the right, authority and duty, created and conferred by law, by which ... an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."[36] "The individual so invested is a public officer."[37] A quasi-judicial officer is further distinguished from a public officer as being a person who has public duties to perform, and as such, takes a judicial oath of office and performs public functions.[38] Quasi-judicial officers include: grand jurors, prosecutors, administrative hearing officers, agency officials who decide whom to prosecute, and agency attorneys who actually conduct the prosecution.[39] There is no

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[36] *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747, 752 (Mo. banc 2005).

[37] *Id*.

[38] *Rice v. Gray,* 34 S.W.2d 567, 571 (Mo. App. 1930).

[39] *Edwards v. Gerstein*, 237 S.W.3d 580, 585-586 (Mo. banc 2007) (Judge Stith, concurring in part and dissenting in part). As such, all have absolute immunity from liability when performing their adjudicatory functions. Id. See *also Group Health Plan, Inc. v. State Bd. of Registration,* 787 S.W.2d 745, 750 (Mo. App. 1990) (holding that quasi-judicial immunity protects "[a]gency official responsible for deciding whether to initiate proceedings ... from a suit for damages for their parts in that decision"). Official immunity and quasi-judicial immunity are both common law immunities subject to legislative modification. *Edwards*, 237 S.W.3d at 582 (Judge Teitelman writing for the majority).

A Missouri Division of Employment Security referee is a quasi-judicial officer and he or she "must observe the strictest impartiality and show no favor to either of the parties by [their] conduct, demeanor or statements."

argument that the Commissioners of the Public Service Commission occupy quasi-judicial positions, at least when they are serving in their quasi-judicial roles.[40]

Missouri courts have held that officials occupying quasi-judicial positions are held to the same high standards as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them.[41] "This means that members of the Public Service Commission may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party."[42] This is true whether based upon the common law rule that no man may be the judge of his own cause, or upon due process requirements for an impartial decision maker.[43] As the courts have articulately elucidated:

> To a large extent the rights of consumers and regulated companies are determined by the Public Service Commission rather than the courts. To

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*Turpin v. Division of Employment Sec.*, 1997 WL 453193, *6 (Mo. App. 1997) (Not reported in S.W.2d). *Jones v. State Dept. of Public Health and Welfare,* 354 S.W.2d 37, 40 (Mo. App. 1962). Administrative proceedings, like judicial trials, should be conducted in accordance with fundamental principles of justice and fairness. *Id.*

As a quasi-judicial officer, the prosecuting attorney must avoid even 'the appearance of impropriety.' " *State v. Clampitt*, 956 S.W.2d 403, 404 (Mo. App. 1997); *State v. Ross,* 829 S.W.2d 948, 951 (Mo. banc 1992) citing *State v. Boyd,* 560 S.W.2d at 297.

State Department of Public Health and Welfare referee is a quasi-judicial officer. It is elementary that he must observe the strictest impartiality and show no favor to either of the parties by his conduct, demeanor or statements. *Jones*, 354 S.W.2d at 40.

[40] *Central Missouri Plumbing Co. v. Plumbers Local Union*, 35 908 S.W.2d 366, 370 -371 (Mo. App. 1995); *Union Elec. Co. v. Public Service Commission*, 591 S.W.2d 134, 137 (Mo. App. 1979). "The Commissioners of the Labor and Industrial Relations Commission, like the members of the Public Service Commission, occupy quasi-judicial positions. Each one is to bring a particular perspective, representative of a particular constituency, to the Commissioner's determination. But all of them must also, as quasi-judicial officers, strive to conscientiously apply the law. The Commissioners are to uphold the Constitution and laws of the state, pursuing a just and conscientious result in accordance with law." *Central Missouri Plumbing Co. v. Plumbers Local Union* 35, 908 S.W.2d 366, 370-371 (Mo. App. 1995). "It is a maxim of common law, the wisdom and propriety of which will not be questioned, that 'no one should be a judge in his own cause.'" *Id*. See also *State ex rel. Sansone v. Wofford,* 111 Mo. 526, 20 S.W. 236 (1892).

[41] *Union Elec. Co.*, 591 S.W.2d at 137.

[42] *Id*.

[43] *Id*. at 139. " . . .every party is entitled to have his case considered by a public service commission consisting only of persons who are not interested or prejudiced in the cause and who are not parties to the cause and prohibition is available to serve this right." *Id*.

> hold that a member of the Commission may not be disqualified for participating in a case in which that member is shown to be interested, biased, prejudiced or a party would be to deprive most of the citizens of this state of one of the most cherished attributes of our system of justice to have his cause determined by a fair and impartial official. Absent a legislative procedure for disqualification of a member of the Commission, the courts will exercise their power to disqualify a member of the Commission upon a showing that a member is a party to a pending case, or is interested or prejudiced in the case.[44]

While these case law citations are not clear with regard to whether they are equating the "same high standards as judicial officers" with the Judicial Canons, a Family Court Commissioner was held to one of the standards in one of the Judicial Canons. Family Court Commissioners act in a quasi-judicial capacity and are not judges because Section 487.030.1 requires the findings of the Commissioner to be adopted by a court before becoming a judgment of the court; a commissioner is not equivalent to a judge.[45] Nevertheless, in the case *In re K.L.W.*,[46] the Missouri Court of Appeals applied one of the Canons to such a Commissioner stating:

> Family court commissioners are obligated to conduct themselves as judicial officers and to follow established procedural and substantive law. *State ex rel. Kramer v. Walker,* 926 S.W.2d 72, 76 (Mo.App. W.D.1996). "Rule 2, Supreme Court Rules, codifies the standard for judicial conduct," and "Rule 2 and the canon[s] of ethics are as applicable to [c]ommissioners as they are to any other judicial officer." *Id.*
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> "Rule 2, Canon 3 D(1) provides that the judge has a duty to recuse 'in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to' the instances delineated." *Williams v. Reed,* 6 S.W.3d 916, 921 (Mo.App. W.D.1999). " '[A] judge's duty to disqualify is not confined to the factors listed ... but is much broader.' " *McPherson,* 99 S.W.3d at 488 (quoting *State ex rel. Wesolich v. Goeke,* 794 S.W.2d 692, 698 (Mo.App. E.D.1990)). "Under Canon 3(D), the test is not whether actual bias or prejudice exist, but whether a reasonable person would have factual

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[44] *Id*. at 139.

[45] *Bell v. Bell*, WL 759591, 1 -2 (Mo. App. 1997) (Not reported in S.W.2d).

[46] 131 S.W.3d 400, 404-407 (Mo. App. 2004).

> grounds to doubt the impartiality of the judge." *Drumm,* 984 S.W.2d at 557. "Judges must 'err on the side of caution by favoring recusal to remove any reasonable doubt [of] impartiality.' " *McPherson,* 99 S.W.3d at 491 (quoting *Robin Farms, Inc. v. Bartholome,* 989 S.W.2d 238, 247 (Mo.App. W.D.1999)).
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> "The public's confidence in the judicial system is the paramount interest safeguarded by the canon." *Id.* at 488. " 'It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair.' " *State ex rel. Thexton v. Killebrew,* 25 S.W.3d 167, 171 (Mo.App. S.D.2000) (quoting *Goeke,* 794 S.W.2d at 695)." 'Acts or conduct [that] give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct [that] inexorably bespeak partiality.'" *McPherson,* 99 S.W.3d at 489 (quoting *State v. Garner,* 760 S.W.2d 893, 906 (Mo.App. S.D.1988)).
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> "Because litigants who present their disputes to a Missouri court are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial, the test for recusal is not whether the court is actually biased or prejudiced." *Williams,* 6 S.W.3d at 921-22. "Rather, the test for recusal when the judge's impartiality is challenged is 'whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.' " *Id.* at 922 (quoting *State v. Jones,* 979 S.W.2d 171, 178 (Mo. banc 1998) (quoting *State v. Smulls,* 935 S.W.2d 9, 17 (Mo. banc 1996))). "If the record demonstrates that a reasonable person would find an appearance of impropriety, recusal is compulsory." *Drumm,* 984 S.W.2d at 557.[47]

It is important to note that this case was fact specific to Family Court Commissioners, a judicial division, not an administrative agency, and that the decision applied the standard of one Canon, the Canon requiring an impartial decisionmaker. This Canon is based upon due process, which is guaranteed in any adverse proceeding determining the rights of litigants.

The argument that the Judicial Canons do not apply to Administrative Commissioners acting in their quasi-judicial capacity is based upon the separation of powers doctrine. Under the doctrine of separation of powers, the Missouri Supreme Court (the drafters and implementers of the Judicial Canons) cannot make rules governing the

conduct of officers of the Executive Department. In *Weinstock v. Holden,* the Missouri Supreme Court invalidated a statute that prohibited a person serving in a judicial capacity from participating "in such capacity in any proceeding in which . . . [t]he person knows the subject matter is such that the person may receive a direct or indirect financial gain from any potential result of the proceeding."[48] The Supreme Court invalidated the statute because it violated the doctrine of the separation of powers in that the Missouri Constitution reserves to the Court the power to "establish rules relating to practice, procedure and pleading for all courts," including the "authority to regulate the practices of judges and lawyers in the courts of this state."[49] The Court pointed out that "[t]he doctrine of separation of powers, as set forth above in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization of power."[50] The Court concluded by stating:

> The goal of preventing conflicts of interest in judicial proceedings certainly is laudable. As discussed above, the judicial branch, through its Code of Judicial Conduct, provides canons to guide judges through possible conflicts of interest, and to require judges to carry out their adjudicatory duties impartially. *Rule 2, Canons 1, 2, and* 3. By establishing these rules for proper judicial conduct, this Court has exercised its powers under article V, sections 4 and 5, and the separation of powers provision in our Constitution prevents the legislature from encroaching on this judicial function. Insofar as section 105.464 violates the separation of powers provision of Missouri Constitution art. II, sec. 1, it is a nullity.[51]

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[47] *In re K.L.W.*, 131 S.W.3d 400, 404 -407 (Mo. App. 2004).

[48] *Weinstock v. Holden,* 995 S.W.2d 408 (Mo. banc 1999).

[49] *Id.* at 410.

[50] *Id.*

[51] *Id.* at 411. The statute in question also referenced persons serving in a quasi-judicial capacity, but the statute was specifically struck down because of its attempt to cover persons acting a judicial capacity.

Consequently, by its own terms and by the Court's proper interpretation of the separation of powers doctrine, Rule 2 applies only to, and could only apply to, judicial officers.[52]

Similarly, in *State Tax Commission v. Jones*,[53] the Missouri Supreme Court invalidated a statute that it interpreted to have conferred judicial powers upon the Administrative Hearing Commission. While not specifically addressing whether the Judicial Canons applied to quasi-judicial administrative officers, the court made abundantly clear that the judicial power of the state is vested in the courts designated in Missouri's Constitution, Article V. Section 1, and it is the courts that declare the law.[54] The argument then flows, if administrative agencies are not courts, and if administrative quasi-judicial officers are not the equivalent of judicial officers, then the Judicial Canons do not apply to the officers or commissioners of administrative agencies.

While not a Missouri case, and while it can only be cited as persuasive authority, the Connecticut Supreme Court's decision in Petrowski *v. Norwich Free Academy*[55] is on point. Its analysis and holding were not ambiguous, and its conclusion is simply that the Judicial Canons do not apply to quasi-judicial officers. The Court eloquently stated:

> The central issue in this case, as correctly posed by the majority opinion below, "becomes what constitutes an impartial hearing panel sufficient to satisfy constitutional due process. Due process requires a fair hearing before a fair tribunal, which principle applies with equal vigor to administrative adjudicatory proceedings. *Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973)." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 554, 481 A.2d 1096.
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> The defendants do not dispute the proposition as stated in the dissenting

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[52] Id.; Supreme Court Rule 2.04; *State ex rel Kramer v. Walker,* 926 S.W.2d 72, (Mo. App. 1996).

[53] *State Tax Commission v. Jones,* 641 S.W.2d 69 (Mo banc 1982).

[54] *Jones*, 641 S.W.2d at 74-75.

[55] 199 Conn. 231, 235-243, 506 A.2d 139,141 - 144 (Conn. 1986).

opinion of the Appellate Court, that "had Tillinghast and Dutton been judges participating in a judicial proceeding, they would have been disqualified, because the relationship between their law firm and the academy would have violated the governing standard for judicial disqualification, which is the reasonable appearance of impropriety." *Petrowski v. Norwich Free Academy,* supra, 566, 481 A.2d 1096 ( *Borden, J.,* dissenting); see *Papa v. New Haven Federation of Teachers,* 186 Conn. 725, 746, 444 A.2d 196 (1982). **The claim of the defendants is simply that the Appellate Court erred in equating the due process standards governing disqualification of administrative adjudicators with the principles governing judicial disqualification.**

A due process analysis requires balancing the governmental interest in existing procedures against the risk of erroneous deprivation of a private interest through the use of these procedures. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Due process demands, however, the existence of impartiality on the part of those who function in judicial or quasi-judicial capacities. *N.L.R.B. v. Ohio New and Rebuilt Parts, Inc.,* 760 F.2d 1443, 1451 (6th Cir.1985); *236 see, e.g., *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-43, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); *Wolkenstein v. Reville,* 694 F.2d 35 (2d Cir.1982), cert. denied, 462 U.S. 1105, 103 S.Ct. 2452, 77 L.Ed.2d 1332 (1983). The courts recognize the presumption that administrators serving as adjudicators are unbiased. See *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); *United States v. Morgan,* 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1940). This presumption can be rebutted by a showing of a conflict of interests; see *Gibson v. Berryhill,* 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973); *Ward v. Monroeville,* 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972); but the burden of establishing a disqualifying interest rests on the party making the contention. *Schweiker v. McClure,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The impermissible interest asserted must be realistic and more than "remote." *Marshall v. Jerrico, Inc.,* supra, 446 U.S. 250, 100 S.Ct. at 1617.

"'The fact that [an administrative hearing officer] might have been disqualified as a judge ... does not, either in principle or under the authorities, infect the hearing with a lack of due process.' *Lopez v. Henry Phipps Plaza South, Inc.,* 498 F.2d 937, 944 (2d Cir.1974)." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 567, 481 A.2d 1096 ( *Borden, J.,* dissenting); see *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970). In *Schweiker v. McClure,* supra, the United States Supreme Court reversed a decision of the District Court which had held that the connection between an insurance carrier whose employees initially had denied Medicare claims and the hearing officers appointed by the carrier to review such denials, whose salaries were paid from federal funds, created a constitutionally intolerable risk of bias against Medicare claimants. The lower

court had based its decision, in part, on the judicial canons concerning disqualification. *McClure v. Harris,* 503 F.Supp. 409, 414-15 (N.D.Cal.1980); Code of Judicial Conduct, 3(C)(1)(b). The Supreme Court reversed, finding no basis for a disqualifying interest among the hearing officers and noting that the district court's analogy to judicial canons was not "apt." *Schweiker v. McClure,* supra, 456 U.S. 197 n. 11, 102 S.Ct. 1671 n. 11. **In *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-74 (2d Cir.1984), the Second Circuit Court of Appeals noted that although arbitrators do act in a quasi-judicial capacity, the disqualification standard for judges need not be applied. "The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator."** Id.; see *Morelite Construction Corporation v. Carpenters Benefit Funds,* 748 F.2d 79, 85 (2d Cir.1984); *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 552 (2d Cir.) cert. denied, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

In support of the proposition that due process requires that administrative adjudicators performing quasi-judicial functions be held to judicial standards of conduct, the Appellate Court relied on *Withrow v. Larkin,* 421 U.S. 35, 46-51, 95 S.Ct. 1456, 1464-66, 43 L.Ed.2d 712 (1975). The majority opinion concluded that "[t]he due process requirement of an impartial hearing body in the quasi-judicial realm is equivalent to that requirement in the judicial realm." *Petrowski v. Norwich Free Academy,* supra, 2 Conn.App. 560, 481 A.2d 1096. **An examination of *Withrow v. Larkin,* however, supports only the proposition that conduct by an administrator which would not require disqualification under judicial standards is constitutionally permissible. From this holding it is logical to deduce only that conduct complying with judicial standards also satisfies those applicable to administrative adjudicators. The conclusion of the Appellate Court, equating administrative with judicial standards, assumes that *Withrow* stands also for the converse proposition, that an interest disqualifying a judge would necessarily disqualify an administrator.**

**The applicable due process standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. *Schweiker v. McClure,* supra. The canons of judicial ethics go far toward cloistering those who become judges, the ultimate arbiters of constitutional and statutory rights, from all extraneous influences that could even remotely be deemed to affect their decisions. Such a rarefied atmosphere of impartiality cannot practically be achieved where the persons acting as administrative adjudicators, whose decisions are normally subject to judicial review, often have other employment or associations in the community they serve. It would be difficult to find competent people willing to serve, commonly without recompense, upon the numerous boards and commissions in this state if any connection with such agencies, however remotely related to the matters they are called upon**

> **to decide, were deemed to disqualify them. Neither the federal courts nor this court require a standard so difficult to implement as a prerequisite of due process of law for administrative adjudication.**
>
> Further, in reference to the plaintiff's broader constitutional claim raised in her preliminary statement of issues, she has simply failed to show that Tillinghast and Dutton had a disqualifying interest sufficient to overcome the "presumption of honesty and integrity" of the board of trustees. *Withrow v. Larkin,* supra, 421 U.S. 47, 95 S.Ct. 1464. **The applicable due process standards for disqualification of officials acting in a judicial or quasi-judicial capacity are detailed in *In re Murchison,* 349 U.S. 133, 137, 75 S.Ct. 623, 625-26, 99 L.Ed. 942 (1955). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." Id., 136, 75 S.Ct. 625.**[56]

Whether or not Missouri courts have affirmatively declared, and whether or not they have the power to declare that the Judicial Canons apply to the Commissioners of the Public Service Commission, the Canons, particularly Canons 3B and 3E, are illuminative with regards to the proper standard of conduct for judicial officers.

**Missouri Supreme Court Rule 2.03 -- Canon 3**
**A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

> **B. Adjudicative Responsibilities.**
>
> (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
>
> (2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
>
> (3) A judge shall require order and decorum in proceedings before the judge.
>
> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official

[56] *Petrowski v. Norwich Free Academy* , 199 Conn. 231, 235-243, 506 A.2d 139,141-144 (Conn. 1986) (emphasis added).

capacity and shall require similar conduct of lawyers and of staff, court officials and others subject to the judge's direction and control.

COMMENTARY

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

COMMENTARY

A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in open court or in chambers to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age against parties, witnesses, counsel or others. This Canon 3B(6) does not preclude legitimate advocacy when race, sex, sexual orientation, religion, national origin, disability or age or other similar factors are issues in the proceeding.

COMMENTARY

Legal interpretations of Title VII of the Civil Rights Act of 1964 provide useful guidance in interpreting the provisions of Canon 3B(5) and (6). Sexual harassment is defined as illegal sex discrimination pursuant to Title VII in the context of employment relationships. A judge must refrain from speech, gestures or other conduct that reasonably could be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. 'Sexual harassment' constitutes misconduct whether the conduct is in an employment relationship or in a nonemployment relationship manifested in the course of the performance of judicial duties.

"Sexual harassment" denotes:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;

(2) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive environment.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding **except that:**

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

**(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.**

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Canon 3B(7), it is the party's lawyer, or if the party is underrepresented, the party, who is to be present or to whom notice is to be given. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Canon 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Canon 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Canon 3B(7)(a) and Canon 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Canon 3B(7) is not violated through law clerks or other personnel on the judge's staff.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

COMMENTARY

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of

witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court.

COMMENTARY

This requirement continues during any appellate process and until final disposition. This Canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

COMMENTARY

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

**E. Recusal.**

(1) A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

COMMENTARY

Under this Canon 3E(1), a judge is disqualified whenever the judge's impartiality might reasonably be question [sic], regardless whether any of the specific rules in Canon 3E(1) apply. For example, if a judge was in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

**By decisional law, the rule of necessity may override the rule of disqualification.** For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

A judge ordinarily required to recuse as a result of the proscriptions of this Canon 3E need not do so in a default proceeding.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

COMMENTARY

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Canon 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any

other more than de minimis interest, that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' under Canon 3E(1) or that the relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Canon 3E may disclose on the record the basis of the disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

A remittal procedure provides the parties an opportunity to proceed without undue delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in this Canon 3F. A party may act through counsel if counsel represents on the record that the party has been consulted and

consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999. Amended November 25, 2003, eff. January 1, 2004.)*

Regardless if the Judicial Canons apply, and regardless if a judicial or a quasi-judicial officer were to violate one of the Canons, one must still look to the legal standard for recusal to determine if a judge, or an quasi-judicial officer must excuse themselves from any particular matter.

**Legal Standard for Recusal**

In *Smulls v. State*,[57] the Missouri Supreme Court articulated the proper legal standard for recusal of a judge for an alleged violation of due process for having prejudged a matter or for being biased. The Court succinctly stated:

> Canon 3(D)(1) of the Missouri Code of Judicial Conduct, Rule 2.03, requires a judge to recuse in a proceeding where a "reasonable person would have a factual basis to doubt the judge's impartiality." *Id.* This standard does not require proof of actual bias, but is an objective standard that recognizes "justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1986). Under this standard, a "reasonable person" is one who gives due regard to the presumption "that judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial." *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996). In addition, a "reasonable person" is one "who knows all that has been said and done in the presence of the judge." *Haynes v. State,* 937 S.W.2d 199, 203 (Mo. banc 1996). Finally, as to due process challenges, the Supreme Court has made clear that "only in the most extreme of cases would disqualification on this basis be constitutionally required." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *see also State v. Jones,* 979 S.W.2d 171, 177 (Mo. banc 1998).[58]

"To qualify, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has

[57] *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002).

learned from participation in the case."[59]

The Missouri Supreme Court has discussed, at length, the meaning of this standard in many cases and with regard to the presumption of a judge's impartiality the court has clarified: "[T]hat presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court."[60] Keeping in mind, of course, that a "reasonable person is one "who knows all that has been said and done in the presence of the judge."[61] The court has further stated: "The judge himself or herself is in the best position to decide whether recusal is necessary."[62] Moreover, "[a] judge has an affirmative duty not to disqualify himself unnecessarily."[63]

"The court indulges a strong presumption in favor of the validity of an administrative determination and will not assume that an administrative body was improperly influenced absent clear and convincing evidence to the contrary."[64] Additionally, it is paramount to note that the burden of establishing a disqualifying interest rests on the party making the contention.[65] Consequently, in order for a party to establish a disqualifying interest based upon an alleged appearance of impropriety sufficient enough to overcome the presumption and require recusal, they must have clear and convincing evidence that a reasonable person, giving due regard to presumption of honesty and impartiality, who knows all that

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[58] *Id.*

[59] *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998).

[60] *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996).

[61] *Smulls*, 71 S.W.3d at145.

[62] *Jones*, 979 S.W.2d at 178.

[63] *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996).

[64] *Orion Security, Inc. v. Board of Police Com'rs of Kansas City*, 90 S.W.3d 157, 164 (Mo. App. 2002).

has been said and done in the presence of the adjudicator, would find an appearance of impropriety and doubt the impartiality of the decisionmaker. This same burden of proof, the clear and convincing evidence standard, would also apply to any allegations of actual bias or actual impropriety.

**Are Parties in Administrative Proceedings Entitled to Disqualify a Commissioner as a Matter of Right? -- Missouri Supreme Court Rule 51.05 – Not Applicable**

Missouri Supreme Court Rule 51.05: (a) provides that "[a] change of judge shall be ordered in any civil action upon the timely filing of a written application therefore by a party" and that "[t]he application need not allege or prove any cause for such change of judge[.]" Pursuant to subsection (e), "[t]he judge promptly shall sustain a timely application for change of judge upon its presentation." The Rule also contains certain specific time limitations.

The rules of civil procedure, specifically Rules 41 through 101, by their terms, are inapplicable to administrative proceedings.[66] These rules only apply to administrative proceedings when specifically authorized by statute.[67] There is no statute expressly extending the application of Rule 51.05 to Commissioners of this agency. Consequently, any party at a proceeding before this Commission wishing to disqualify a Commissioner must show cause pursuant to the standards for recusal; there are no disqualifications as a matter of right in administrative proceedings.[68]

**A Brief Review of the Standards Concerning Prejudgment and Bias**

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[65] *Schweiker v. McClure,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982); *Orion*, 90 S.W.3d at 164.

[66] *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 762 (Mo. App. 2007); *Woodman v. Director of Revenue,* 8 S.W.3d 154, 157 (Mo. App. 1999). *See also Johnson v. Mo. Bd. of Nursing Adm'rs,* 130 S.W.3d 619, 626 (Mo. App. 2004).

[67] *Id*.

[68] Similarly, any party wishing to disqualify a Regulatory Law Judge presiding over a Commission matter must show cause pursuant to Commission Rule 4 CSR 240-2.120(2).

In order for any proper party to succeed on a motion to disqualify a Commissioner on the basis of some form of alleged bias it must provide a sufficient factual basis to overcome the presumption that the administrative decisionmaker acts honestly and impartially.[69] To establish **actual bias** on the part of a Commissioner, the party must prove, with clear and convincing evidence, that the Commissioner has formulated an "unalterable prejudgment of the operative adjudicative facts of the case."[70] To establish the existence of **actual impropriety** on the part of a Commissioner, the party must prove, with clear and convincing evidence, that the Commissioner is interested, (i.e. has a stake in the case) or prejudiced or occupies the status of a party to the matter.[71] To establish an **appearance of impropriety**, the party would have to prove, with clear and convincing evidence, that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioner would doubt the impartiality of that Commissioner.[72]

**Other Statutory Protections**

In addition to the statutory and case law protections already discussed, the General Assembly has erected other protections of the public interest in constituting the Public Service Commission. It has provided for nomination by the Governor and confirmation by the Missouri Senate, and it has established six-year terms, staggered to provide

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[69] *Thompson*, 100 S.W.3d at 919 -920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[70] *Fitzgerald*, 796 S.W.2d at 59.

[71] *Union Elec. Co.*, 591 S.W.2d at 137.

[72] *Kinder,* 942 S.W.2d at 321. Being "impartial" is defined as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair and just." *Black's Law Dictionary*, 6th Edition, West Publishing Company, 1990, p. 752.

continuity.[73] It has provided for the independence of the Commission by providing for removal for cause from office by the Governor or a super-majority of each house, only after formal charges and an opportunity for a hearing.[74] It has provided for removal of any Commissioner, officer, agent or employee of the commission for violating the Conflicts of Interest Statute.[75] That same statute also imposed civil and criminal penalties for violations.[76] And finally, and perhaps most importantly, the General Assembly has provided for judicial review of all of the Commission's decisions.[77]

## Roundtable Comments, Statements, Suggestions, and Proposals

Prior to the commencement of the Roundtable Discussion, the Chairman encouraged the participants to this inquiry to divide their comments and proposals into three categories: (a) actions the Commission can implement informally; (b) actions requiring formal Commission action, i.e. rulemaking; and (c) recommended statutory changes. The Chairman clarified that no set format was required and that comments, suggestions and proposals could simply be presented at the Roundtable, or even after the Roundtable.

### Summary of Initial Comments and Presentations Filed Prior to the Roundtable

In response to the Chairman's directives, four responses were filed prior to, or during, the Roundtable. Additionally, OPC filed a motion to open a rulemaking docket and offered proposed revision to the Commission's current Standard of Conduct Rules. Those

[73] Section 386.050, RSMo 2000.

[74] Section 386.060, RSMo 2000.

[75] Section 386.200, RSMo 2000.

[76] *Id*.

[77] Section 386.510, and 386.540, RSMo 2000.

responses and filings are summarized below. The full text of those filings and responses appears in Appendix C of this Report.

**The Office of the Public Counsel**[78]

While the Office of the Public Counsel ("OPC") did not formally file any comments or suggestions in this workshop docket, it did file a motion to open a rulemaking docket, assigned Docket No. AX-2008-0201. In that motion, OPC, *et al*., seeks revision of the Commission's Standard of Conduct Rules, specifically Commission Rule 4 CSR 240-4.020.

OPC's proposal would revise the current subsections of the rule as well as add seven completely new subsections. OPC's proposal includes, *inter alia*: (1) a provision requiring the recording and transcription of every public meeting the commission holds as public meetings are defined in Chapter 610; (2) a provision requiring mandatory recusal of a Commissioner, Regulatory Law Judge, or Advisor for making any *ex parte* communication or for failing to disclose any *ex parte* communication; and, (3) a provision that allows the Commission, at their discretion, to require a party making an *ex parte* communication to show cause why their claim or interest should not be dismissed or denied.

**Scott Hempling, Esq., Executive Director National Regulatory Research Institute**[79]

Mr. Hempling focused his discussion on three primary questions: (1) What procedural principles best serve regulation's purposes; (2) can informality co-exist with objectivity; and, (3) is there a trust problem here?

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[78] See Roundtable Exhibit Number 1 in Appendix C.

[79] See Roundtable Exhibit Number 9 in Appendix C. The National Regulatory Research Institute. NRRI is an independent, nonprofit corporation funded primarily through voluntary dues contributed by state public service commissions. Its mission is to provide the research services state utility commissions need to make regulatory decisions of the highest possible quality.

## I. What Procedural Principles Best Serve Regulation's Purposes?

Economic regulation seeks to align private behavior with the public interest. For today's regulators, the public interest is becoming difficult to discern: New interest groups, accelerated technological change, higher customer expectations, lower investor patience, and growing instability in corporate and market structures, are combining to blur regulatory vision. Enlarging the problem is the uncertain stature of state commissions. Underfunded and understaffed relative to their responsibilities, they also face a common political dichotomy: citizens support regulation when it protects, but reject regulation when it obstructs.

To preserve its political effectiveness, regulation cannot ignore these pressures. But to preserve its professionalism, regulation cannot succumb to them. Otherwise regulation becomes mere conflict resolution rather than public interest promotion. For the public interest to prevail, regulators have to gather facts, and create opportunities for objective analysis. So, what procedures best carry out these purposes? I have two main thoughts.

### A. Shift the focus from the parties' interests to the regulatory interest

The present debate seems focused on parties' behavior: What does the law permit and prohibit parties to say and do? Who said what to whom, when and under what circumstances? Rules on party behavior, like rules in athletic contests, are indispensable because they define boundaries and thus build trust in the outcomes.

Unlike athletic contests, however, regulation is not a forum in which private interests get an opportunity to win; it is a forum in which government officials carry out their obligation to align private behavior with public interest. I suggest, therefore, that we focus more on what regulators need to do their duty.

**1. Regulators need full information and objective analysis.** Regulators, like all people, gather and absorb information in different ways: Some by listening, some by talking, some by writing, some by reading, some by all of the above. Some learn by causing opposing views to confront each other publicly; others learn by sitting in a room quietly, meeting with one person at a time. Some like to hear from the parties first, then study objective materials. Others prefer to study objective materials first; thus educated, they then turn to the parties. The regulator needs to find the right person to talk to, at the right time. The right person is not necessarily party's designated witness.

**2. Regulators are forced to learn on the job.** They are rarely as well educated, in terms of utility regulation, as the professionals coming to meet them. That differential creates opportunities for exploitation. A party who takes advantage of that differential -- by telling only half the story, by omitting contrary arguments, by shading the facts, by oversimplification-through-powerpoint -- contributes to the degradation of the forum and the process. She is being penny wise and pound foolish. In the long run no one benefits from a forum that makes decisions based on self-interest arguments.

## B. Find the right mix of formality and informality

**Benefits of informality:** The author Russell Baker wrote: "An educated person is one who has learned that information almost always turns out to be at best incomplete and very often false, misleading, fictitious, mendacious - just dead wrong." The key to becoming educated is to ask the uneducated question. The great explorers, from Galileo to Edison to Watson and Crick, made their discoveries by asking ignorant questions. So do inexperienced regulators. But they'd rather ask their ignorant questions in private.

**In regulation the purpose is not to choose between private party positions, but to advance the public interest. Regulators are not judges; they are policymakers.** (Emphasis added.) Sometimes they use adjudication as a procedure to make policy but they make policy for all residents. In an adversarial focus, the focus is on the adversaries. In regulation, the focus must be on the public.

## II. Can Informality Co-Exist with Objectivity?

Underlying the legal prohibitions against ex parte contacts and prejudgment is a goal of objectivity. Are there ways to preserve objectivity while allowing informality?

### A. Informal, pre-filing conversations -- if handled carefully -- serve useful purposes.

In informal conversations, questions get asked; precision is sought. Here are six simple suggestions to preserve the positives while diminishing the negatives.

**1. The purpose should not be to read tea leaves.** The Commissioners are barred from expressing an opinion; so seeking an opinion is an invitation to violate the integrity of the process. A party committed to the integrity of the process will not invite a Commissioner to violate it.

**2. The purpose should be two-fold: to pay the courtesy of advance notice, and to see what questions or concerns a Commission might have.** Why the courtesy of advance notice? So the Commissioners can begin their preparation. They can seek objective reading material, assign assistants to draft briefing papers, determine the necessary staffing, start the process of retaining consultants. Eliciting Commissioner questions and concerns allows parties to focus their submissions on the public interest. Provided a Commissioner makes clear she has no fixed position, where is the prejudgment or impropriety?

**3. Commissioners should ask questions but express no final opinions.** Probing questions should not be confused with negative conclusions. When two retail monopolies propose to merge, it is reasonable to probe.

**4. If the party uses written materials, they should become public within 24 hours.**

**5. The Commissioner should place notice of the meeting on the public record.**

**6. Others should have opportunities to discuss the same issues with the same Commissioners.**

Implementation of these six ideas seems to be to remove any basis for taint, while preserving the flexibility necessary for clearheaded information-gathering.

## B. There is a tendency to confuse unequal access with improper access

Indisputable fact: The major utilities have more regulatory affairs resources than do the intervenors. This asymmetry of access creates opportunities to take advantage. Even a straight, objective presentation creates an advantage: a bond, a reputation for responsiveness, a dependency. That is why people seek face time with Commissioners. The people not present, those with fewer access resources, lack those opportunities and advantages. This asymmetry of access is exacerbated by irony: irony that the asymmetry is funded in part by ratepayers because regulatory relations is a cost of doing business recoverable in rates.

But: unequal access is not improper access. The solution is not to limit access, but to expand it by creating comparable resource bases for the customer side. I see no reason why regulated utilities would not support legislation which grants to the OPC a level of ratepayer-funded regulatory resources bearing some reasonable relation to the utilities' ratepayer-funded resources. That is not the present case. Why not?

## C. A few words on prejudgment

We should take care to distinguish bias from hunch. A bias is an inability or unwillingness to examine all facts and reason objectively. A hunch is tentative conclusion, based on education and experience, that a particular set of propositions is more likely to be true than false; and that if true, requires a particular outcome. No one wants a bench saying "my mind is a complete blank." The regulatory mind is not blank; it is full of experiences, prior readings, stray facts both diligently and casually acquired and evaluated. Those stray facts lead to hunches. Hunches are unavoidable and they are useful -- as long as the regulator establishes a systematic, objective method for testing them. And the expression of a hunch, in public or private, is not prejudgment. Expressing a hunch gets a reaction; and commissioners can learn from the reaction. Let’s avoid dampening the thought process in the name of unachieavable procedural purity.

## D. A few words on appearance of impartiality

The law is clear: the mere fact of a meeting, not ex parte, does not signal partiality. Nor does a flurry of post-meeting emails from the non-Commissioner attendees, about how positive the meeting was.

It is human nature to deceive oneself about a meeting's outcome. I've lost track of the number of lawyers, including me, who left their oral arguments thinking they'd won because the bench was friendlier to their side. It would help if meeting participants characterized their meetings more cautiously. Rather than saying things like "the Commissioner reacted positively," try this: "He asked a lot of questions. More questions than I expected; more questions than I wanted, but good questions. We'd better get to work on the answers."

## III. Is There a Trust Problem Here?

The parties have framed their dispute in the language of procedural law. But I wonder if the underlying problem is one of trust. Consider three examples:[80]

1. If one employee says the meeting's purpose was merely courtesy and education, while his boss says its purpose was to gauge the Commissioners' reactions before he signed a multibillion contract, trust diminishes.

i) If a party seeks Commissioner disqualifications, through a motion that (i) ascribes to the Commissioners no act other than attending a lawful meeting, (ii) asserts “appearance of impropriety” on the sole basis that a non-Commissioner participant later characterized the Commissioners’ views as favorable, (iii) cites no case supporting the argument that a lawful meeting becomes unlawful solely because a non-Commissioner participant writes hearsay about a Commissioner’s position, and (iv) offers no independent evidence of Commissioner prejudgment, trust diminishes.

ii) When after 20 years of continuous merger proposals, there remains in the regulatory community no clear principles on how to measure, compare and allocate merger costs and benefits, trust diminishes.

Distrust breeds rigidity, but regulation requires flexibility.

## Conclusion

In an appeal of a Federal Power Commission decision, the U.S. Court of Appeals for Second Circuit wrote:

> "... [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

*Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom.*, *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

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[80] These are hypothetical examples only. Any resemblance to the real world is completely coincidental.

If we can design administrative procedures that recognize that the Commission's powers are broader than declaring winners and losers, we have a shot at giving the public the "active and affirmative protection" it deserves.

**The Missouri Energy Development Association**[81]

The Missouri Energy Development Association ("MEDA") provided comments intended to provide the Commission, and the other participating stakeholders, with MEDA's view on three over-arching principles that MEDA believes should govern any revisions to the existing standards.

The first principle that MEDA believes should be followed in evaluating any potential revisions in this area is the long-standing concept that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy. In the context of this proceeding, this means that any rule changes should continue to allow for free communication among Commissioners, the Commission's staff ("Staff"), the public, utilities and anyone else, *to the extent that such communication does not address a pending case*. The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. See Section 386.210, RSMo. Cum. Supp. 2006. Moreover, the Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly*. State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission*, 225 S.W.2d 792, 793 (Mo. App. 1949).

The free exchange of information contemplated by the Missouri Legislature is absolutely essential if the Commission is to properly discharge its duties. Unlike a judge

[81] See Roundtable Exhibit Number 2 in Appendix C. MEDA's member companies consist of Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, Aquila, Inc., Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation, and Missouri-American Water Company.

presiding over a discrete dispute involving private parties, utility commissions have sweeping and ongoing regulatory jurisdiction over the utilities they regulate, *Borron v. Farrenkoph,* 5 S.W.3d 618, 624 (Mo. App. 1999), including powers that are both quasi-judicial and quasi-legislative in nature. And to exercise those powers effectively and fairly, Commissioners must educate themselves on a wide variety of matters affecting the utilities they regulate.

A second over-arching principle that MEDA believes should be followed involves the need to ensure parity in the formulation and application of any requirements governing communications between Commissioners and participants in the regulatory process. In other words, should the Commission determine that it is necessary and appropriate to impose new restrictions on such communications (to ensure fairness in a pending proceeding, for example), then such restrictions must be imposed equally on all parties appearing before the Commission.

A third over-arching principle is that any restrictions that the Commission adopts should continue to recognize the distinction between contested cases and rulemaking proceedings. Due in large part to the Commission's own arguments before the courts of this state, it has been recognized that the Commission exercises quasi-legislative powers when it engages in rulemaking and that the full range of procedural protections afforded in a contested hearing context do not apply. *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 103 S.W.3d 753, 759-760 (Mo. banc 2003). Like the legislature, the Commission should therefore not be restricted from communicating with stakeholders when it properly formulates policies of general applicability during the rulemaking process.

Finally, MEDA would note that it disagrees with certain aspects of the revisions to

the Commission's rules that were recently proposed by Public Counsel and others, primarily because they violate the over-arching principles described above.

**Julie Noonan, Missouri Citizen, Member of StopAquila.org**[82]

Ms. Noonan submitted specific recommendations for informal Commission action, formal Commission action and for proposed statutory changes that pertain to adherence to existing Missouri State Statutes, Commission Rules, and the Code of Conduct. Ms. Noonan emphasized the need for changes to increase public confidence in the Commission. Her suggestions are summarized as follows:

**Recommendations for Actions the Commission can Implement Informally**

1) Adopt PSC Standards of Conduct

The Commission establishes and formally adopts Public Service Commission Standards of Conduct (SOC) to provide specific guidance for the conduct of the Commission as it supports Commission business.

2) Implement PSC Standards of Conduct Affidavit

All Commission orders include an affidavit from the Regulatory Law Judge acting as the Hearing Officer that all PSC SOC's were observed and upheld leading up to the issuance of the Commission Order at hand.

3) Affirmation of PSC Constitutional Public Protection

The PSC respects citizens' rights and refuses to condone, reward, or act in collusion with regulated entities who subvert citizen rights granted in United States Amendment XIV and the Missouri Constitution, Article I Bill of Rights.

4) Affirmation of PSC Legal Compliance Intent

PSC honors "the letter of the law and seeks to fulfill the spirit and the intent of the law", as suggested in 4 CSR 240 Executive Order 92-04. PSC also "shall conduct the business of state government in a manner which inspires public confidence and trust" as suggested in the Code of Conduct.

[82] See Roundtable Exhibit Numbers 3 and 4 in Appendix C.

5) Affirmation of PSC Enforcement Pertaining to Site Specific Certificates of Need and Necessity

The PSC affirms and demonstrates that the Commission respects the Missouri Constitution, the Revised Missouri State Statutes, and the direction within the final WD64985 Opinion of the Missouri Court of Appeals that specifies that a utility must secure a Site Specific Certificate of Need and Necessity prior to disturbing the first spadeful of soil when planning to build or expand power generation facilities. The PSC requires that utilities seeking a Site Specific CNN comply with all applicable local laws, and no Site Specific CNN will be awarded unless the utility provides undisputed (by local governments where such facilities are proposed to be located/expanded) proof of compliance with applicable local laws, ordinances, permitting, zoning, etc.

6) Affirmation of Full, Fair, and Impartial Hearings

With the assistance of the Regulatory Law Judge acting as Hearing Officer, the PSC Chairman ensures that all hearings are full, fair, and impartial.

7) Affirmation of Applicant Burden of Proof

The PSC ensures that the burden of proof for Need & Necessity and other requested orders from the PSC is upon the Applicant and NOT on interveners.

8) Affirmation of PSC and/or Independent Evaluation of Applicant Claims

The PSC ensures that staff and/or others independently examine all Applicant claims relative to least cost options and insist upon adherence to least cost options unless there is a competing objective of decreased dependence on generation utilizing fossil fuels.

9) Affirmation of PSC Public Protection in matters of Long Term Planning and Ratemaking

The PSC must ensure that utilities make continual progress toward implementing long term planning to reduce customer exposure to fossil fuel volatility and that reflects appropriate mix between types of power generation.

10) Affirmation of PSC Commitment to Approve Rate Inclusion Limited to Actual Facilities and Generation that are Used and Useful

The PSC only considers and contemplates approval of reasonable expenses for actual facilities that are both used and useful.

11) Affirmation of PSC Regulation of Regulated Utility Asset Disposal

The PSC ensures that no utility is granted an order authorizing it to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so."

12) Affirmation of PSC Freedom from Outside Influence

The PSC avoids any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of official duties. In addition to the familial relationships specified within the law, any Commissioner or Regulatory Law Judge who has a personal relationship with a representative or member of an Applicant recuses themselves from all cases that involve that Applicant in order to ensure fair and impartial decision making by the Commission.

13) Affirmation of PSC Compliance with Limitation of Powers

The PSC refrains from extending powers beyond that which are specifically bestowed on the Commission by Missouri State Statutes.

14) Affirmation of PSC Reliance on Established Processes

The PSC relies solely on processes outlined in the law, PSC Rules, and those which are agreed to and understood by all parties in a matter.

**Recommended Actions Requiring Formal Commission Action (i.e. Rulemaking)**

1) PSC Complaint Support

Create and enforce a rule directing PSC Staff to:

a) Ensure that PSC rules for filing both Informal and Formal Complaints are posted on the PSC web site in conjunction with the complaint form that currently is located at: http://psc.missouri.gov/ComplaintForm.asp.
b) Ensure that the form referenced in a) above does not provide an impression that acceptable complaints are limited to billing or personal utility consumption issues.
c) In addition, the rule directs PSC Staff to offer the same information about rules for filing both Informal and Formal Complaints to anyone who calls or visits the PSC intending to make a complaint.
d) The web site and PSC Staff clearly inform individuals desiring to file an informal complaint that if they are not satisfied with the response, they may file a formal complaint to seek satisfactory resolution.

e) Within the same or in a separate rule, the Commission directs PSC Staff to provide full disclosure, information, and assistance to citizens and other governmental agencies that seek information relevant to the processes, rules, and business and of the PSC.

2) Establishment of Intervener Fund

Create and enforce a rule modeled off of a concept contained within New York State Law that establishes an account funded by the Applicant for the purpose of defraying the cost of representation for local interveners (governmental bodies that are not the applicant and other local parties).

**Recommended Statutory Changes**

1) PSC Refrains from Sponsoring or Supporting changes that Legalize that which is Illegal

2) Commission Membership and Attendance

Expand the number of Commissioners of the PSC so that committees of Commissioners are assigned to cases before the PSC. In addition to increasing the number of PSC Commissioners, the law or associated rules should include additional provisions which ensure that:

a) A prescribed number of Commissioners (not less than 3) are in physical attendance or are attending via video conference all hearings and meetings related to a case,
b)That the presiding Regulatory Law Judge will call for questions of Commissioners attending via video conference just as if the Commissioner were physically present in the room, and
c)That Commissioners must be in attendance (as indicated in "a") a minimum of XX% of the time expended for all sessions (Pre-hearing Conference, Public Hearings, Hearings, etc) related to a case in order to be eligible to vote upon that case,
d) The presiding Regulatory Law Judge or Court Reporter will make record of all time each Commissioner is in attendance during each part and for the entirety of the case. Records will be reviewed prior to voting on the matter and the Regulatory Law Judge will announce eligibility of each Commissioner to vote on the case.

**The Staff of the Missouri Public Service Commission**[83]

Staff filed its response to OPC's motion for rulemaking in docket number AX-2008-

[83] See Roundtable Exhibit Number 5 in Appendix C.

0201 in this workshop docket because of the related issues in these two dockets. Staff believes that OPC's request for rulemaking does not satisfy Chapter 536's requirements (Missouri's Administrative Procedures Act), and is not legally authorized or justified. Staff further asserts that OPC's proposed amendments are not necessary and are unworkable and unlawful because they are not the right amendments.

Staff observes that Commissioners are administrative officers of the Executive Branch; they are not judicial officers.[84] Unlike judicial officers, who are expected to know nothing of the controversies brought to them, the PSC Commissioners are expected to be knowledgeable, if not expert, in the area of the utility industry. Unlike judges, the PSC Commissioners have administrative, regulatory and enforcement duties, as well as policy-making and quasi-legislative duties. These points are not controversial or unusual but are a commonplace of administrative law. *See* A.S. Neeley, *Administrative Practice & Procedure,* 20 Missouri Practice § 1.04 (3rd ed., 2001). Yet the Movants (OPC, et al.) propose rule amendments that would needlessly and unlawfully hamper the Commissioners in fulfilling the full range of their statutory responsibilities. Moreover, in essence, the Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners.

It is well-established that administrative rules may only be promulgated within the scope of the authorizing legislation. *State ex rel. Doe Run Company v. Brown,* 918 S.W.2d 303, 306 (Mo. App. 1996). An administrative rule that is contrary to statute is a nullity. "The rules or regulations of a state agency are invalid if ... they attempt to expand or modify statutes. Further, regulations may not conflict with the statutes and if a regulation does, it

[84] GPE-Aquila Merger Docket, Case No. EM-2007-0374 (Staff's Response to Public Counsel's Motion to

must fail." *Hansen v. State Dept. of Social Services, Family Support Div.,* 226 S.W.3d 137, 144 (Mo. banc 2007), quoting *PharmFlex, Inc. v. Division of Employment Security,* 964 S.W.2d 825, 829 (Mo. App. 1997).

Section 386.210, RSMo Supp. 2007, governs communications between the Commissioners and other persons outside of evidentiary hearings and it is immediately apparent that the amendments proposed by the Movants are contrary to § 386.210, RSMo. Cum. Supp. 2007, or other provisions of law, and are thus unlawful:

> A. At proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is contrary to established legal usage and, additionally, prohibits communications that are otherwise lawful under § 386.210, RSMo. Supp. 2007.
>
> B. Movants propose deleting present subsection (7) of Rule 4 CSR 240-4.020, which states when the prohibitions on communications in the rule apply, although the subsection restates the timing provisions contained in the statute.
>
> C. Proposed subsection (10) is contrary to both § 386.450 and the provisions of Chapter 610, RSMo, constituting the "Missouri Sunshine Law," and is thus unlawful.
>
> D. Additionally, the proposed amendments are unlawful because they would prevent the Commissioners from discharging their duties under the statutes.

Staff also observes that it is apparent that the proposed amendments are not practicable:

> A. As noted previously, at proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is so incredibly overly expansive as to effectively prohibit any communication by a Commission member with almost anyone on any matter relating to the business of the Public Service Commission.
>
> B. Proposed subsection (4) does not use the term "ex parte communication" that Movants have carefully (and over-expansively) defined at proposed

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Dismiss, filed on December 27, 2007), p. 7 ff. See Roundtable Exhibits 5 and 6 in Appendix C.

subsection (1)(A) and is thus ambiguous. By referring to "the merits of the cause," do Movants intend this prohibition to apply only to pending cases?

C. Movants propose to amend existing subsection (8) to provide that reports of inadvertent *ex parte* communications must be either filed publicly in the appropriate pending case or, if no case is pending, copies to "each party to the utility's most recent general rate case or earnings complaint case." This proposal imposes an onerous and expensive reporting burden upon the Commission.

D. The language "to an individual Commissioner or to any two Commissioners or to a quorum of the Commission" at proposed subsection (10) is poorly drafted and redundant. Additionally, why should the prohibition in subsection (10) apply only to utilities? Prohibitions should apply to all parties and stakeholders equally.

E. Proposed subsection (11) imposes an expensive obligation upon the Commission that serves no public purpose. Let those who desire transcripts of the Commission's open meetings pay for reporters and copies of transcripts. What public purpose is served by making a verbatim record of the Commission's closed meetings? If a person or entity wants to challenge the Commission's closing of a meeting, the burden is on that person or entity. The Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners. Such a presumption is contrary to settled Missouri law, which presumes that administrative officers act properly and lawfully.

F. Proposed subsection (12) is unworkable. It is inappropriate for the Public Counsel, let alone private parties, to have any investigatory authority with respect to the Commission. The Public Counsel is hardly disinterested and there are no provisions proposed that would prevent the Public Counsel from abusing this authority.

G. Proposed subsection (14) is unworkable. Who will determine that an *ex parte* communication was made?[85]

H. Proposed subsection (15) is unnecessary as it merely restates existing law.

I. Additionally, the proposed amendments are not practicable because they would prevent the Commissioners from discharging their duties under the statutes.

[85] It is worthy to note that what OPC proposed in subsection (14) of its proposed rule amounts to a mandatory recusal policy based upon strict liability. This standard is higher than any standard imposed upon any member of the judiciary. So while OPC attempts to equate PSC Commissioners with Judges, it also attempts to hold them to a higher standard than the Judicial Canons or Missouri case law prescribes.

Additionally Staff points out that:

> . . . to the extent that any significant change to the existing structure of statutes and rules is deemed absolutely necessary, Staff suggests that some consideration should be given to a change similar to that enacted by the Legislature when similar concerns arose concerning the impartiality of the various boards that regulate the licensed professions. To address that concern, the Legislature removed the adjudicative function from the boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. In like manner, the Movants' concerns could be better addressed by transferring a measure of the Commission's adjudicative authority to the Commission's cadre of Regulatory Law Judges (RLJs), leaving the Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. To allay Movants' concerns, the RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Staff believes that, while such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000, clearly for such a change after nearly 100 years of the Commission's existence it would be better to seek the blessing and imprimatur of the Legislature, and it is only one of a number of proposals that might be considered.

Staff finally notes that its suggestion, *supra*:

> . . . should not be read to indicate that Staff believes that any such significant restructuring is necessary. Rather, Staff believes that a prudent and thoughtful compliance with existing statutes and rules both protects the rights of the parties and protects the Commission from unfair public criticism. Staff is not saying that the Commission should do nothing. For example, the Commission should consider amending its existing rules to provide more transparency in the Commissioners' day-to-day activity out of the hearing room and the Agenda. Staff is merely suggesting that the Commission and others should not overreact. Failing to overreact just a few years ago to the unlimited promises of retail competition has saved the State from the unlimited detriments now being experienced by those States that did so.

## Transcripts – Presentations and Comments Made at the Roundtable[86]

The official Transcript was filed in this docket on January 9, 2008. It is available on the Commission's Electronic Filing and Information System. The presentations and comments at the Roundtable mirrored those that were pre-filed and referenced above.

# ADDITIONAL DISCUSSION OF THE ISSUES

Federal quasi-judicial officers are faced with the exact same internal and external communication issues that state quasi-judicial officers must deal with when discharging their duties. Charles Koch, Jr.[87] recently published an enlightened discussion concerning *ex parte* contacts in federal administrative agencies in the Journal of Administrative Law and Practice.[88] Some of Professor Koch's significant conclusions are worth noting:[89]

**[1] Adjudication**

***(a) Communication with those outside the agency.***

- Congress enacted the provisions prohibiting *ex parte* communication to ensure that "agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome."

- Congress recognized, however, that not all communications between agency decisionmakers and interested parties would contravene the purpose of the prohibition against *ex parte* communications. Excluded from the proscribed communications were those contacts that do not affect the way a given case is decided. A decisionmaker's disclosure as to the progress or completion of a proceeding is not an illegal *ex parte* communication.

- A number of administrative functions involve meetings and communications with those who deal regularly with the agency. The agency builds experience and expertise through these recurring contacts. The prohibition against *ex parte* communication must be tempered by the need to allow the agency to do its job. In order to build a case for illegal *ex parte* communication, one must show that such contacts would lead a disinterested observer to infer that the contacts will affect the decision. The fact that the agency had recurring, but independent, contacts with an interest which is also party in a pending case is not enough.

- An agency cannot be said to have allowed an illegal *ex parte* communication

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[86] See Transcript, Volume 1, filed in Docket Number AO-2008-0192 on January 9, 2008.

[87] Dudley W. Woodbridge Professor of Law, College of William and Mary, Marshall-Wythe School of Law.

[88] Roundtable Exhibit 11, Appendix C.

[89] Charles H. Koch, Jr., *Section 6.12 Ex Parte, Integrity in the Administrative Process*, 2 Admin. L. & Prac. § 6.12 (2d ed.) (2007).

because information was submitted to it. While disclosure may be required of such communications in general, inconsequential communication may require no special treatment.

- [I]f an *ex parte* consultation would be appropriate at a trial, it should be acceptable in an administrative hearing.

- Official contact with the parties does not usually constitute illegal *ex parte* communication. Thus the fact that an ALJ met with the parties to facilitate a settlement and does not evidence illegal *ex parte* communication.

***(b) Communication within the agency.***

- Prohibition against *ex parte* communication overlaps with the separation of functions doctrine when the *ex parte* communication comes from inside the agency. However *ex parte* communication from staff not involved in prosecution and investigation are not covered by the separation of functions doctrine. Generally, communication from the agency's nonlitigation staff will not constitute illegal *ex parte* communication.

- "[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper."

***(c) Discovery.***

- Building a case in support of a claim of *ex parte* communication may be difficult because, by definition, the illegal contact was secret. Therefore discovery may be necessary in such a challenge. The Ninth Circuit granted judicial discovery in Public Power Council v. Johnson "because of the unusual combination of: (1) the novelty of the issues presented; (2) the need for extremely prompt action under the pertinent statute; and (3) the significance of the questions presented in the petition for review." However, it found that an administrative evidentiary hearing was appropriate where the purposes of the act would not be frustrated or imperiled by allowing the agency to develop the necessary facts and initially determining whether the APA had been violated.

***(d) Remedies.***

- **The remedy for *ex parte* contacts, unlike bias or combination of functions, cannot be disqualification; otherwise a party could eliminate unfavorable decisionmakers by initiating *ex parte* contacts with them.** (Emphasis added.)

- The remedy is to place the communication on the public record. The person who knowingly commits an *ex parte* contact, however, may be deprived of the opportunity for a hearing and forfeit the contested interest.

- If the *ex parte* communication is not cured at the agency level the administrative

decision may be overturned on judicial review.

- ❖ In the extreme case, where a person knowingly attempts an illegal ex parte communication, the APA provides that the person may be subject to an adverse decision because of the violation.

- ❖ A challenge of *ex parte* communication must generally be made on the appeal of the final order. A court should presume that the agency process will cure any taint of *ex parte* communication and hence it should not accept interlocutory review of that issue.

**[2] Rulemaking**

- ❖ The preventive measures for *ex parte* communication are not so strictly applied in rulemaking as they are in adjudication. Rulemaking should be a public process, and any questionable *ex parte* communication need only be added to the rulemaking record to avoid any charge of impropriety. Disclosure should be generally sufficient because disclosure is sufficient even in adjudication.

***(a) Outside contacts.***

- ❖ The APA provisions controlling ex parte communication do not apply to notice and comment rulemaking (but may apply to formal rulemaking).

- ❖ Communications received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. Of course, if the information contained in such a communication forms the basis for agency action, under well established principles, that information must be disclosed to the public in some form.

- ❖ Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process should refuse to discuss the rule with interested persons. If ex parte contacts nonetheless occur, any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.

***(b) Internal contacts.***

- ❖ Whatever limitations are imposed on *ex parte* communications between the decisionmaker and those outside the agency, there are none on *ex parte* communications between the decisionmaker and the agency staff.

- ❖ The separation of functions is not required for rulemaking and hence communication between the decisionmaker and members of the investigative staff are permitted.

**[3] State law on *ex parte* communications**

***(a) Adjudication.***

- States vary a good deal with respect to *ex parte* communication in adjudications. However the rule is that *ex parte* communication is prohibited in formal adjudications.

- In Arkansas, in order to violate an *ex parte* communications statute concerning issues of law or fact relating to an adjudicatory proceeding, proof of the existence and content of the alleged communication must be shown.

- The Supreme Court of South Carolina interpreted the purpose of South Carolina Constitution's Article I, § 22 to be to ensure that adjudications are conducted by impartial administrative bodies. The Court further stated that a violation of this constitutional provision would occur if an adjudicator "either has ex parte information as a result of prior investigation[s] or has developed, by prior involvement with the case, a 'will to win.' " The Supreme Court of South Carolina stated that "although the Court condemns ex parte communication, it has refused to adopt a per se rule automatically reversing rulings which result from ex parte communications. Instead, the Court considers whether prejudice results from the ex parte contact."

- The Connecticut Court stated: "Receipt of ex parte evidence merely shifts the burden of proof from the aggrieved party to the applicant to demonstrate that the communication was harmless."

- The Supreme Court of Indiana held that a board of county solid waste management's consideration of a permit application was a function of both adjudication and legislation, and therefore ex parte communications by board members with public citizens regarding the application were proper because the board was a local agency expected to respond to concerns of its constituents. Since it was not a court proceeding, the input could be received in a less formalized manner.

- In North Dakota, ex parte communications are those that do not afford notice and opportunity for all parties to participate. The N.D. APA permits certain ex parte communications in administrative proceedings, but prohibits others. In general, an agency hearing officer may not communicate about any issue in a proceeding with anyone affected by or participating in that hearing while it is pending. There are two exceptions. First, if more than one person is acting as the hearing officer, those persons can communicate with each other about a matter pending before the panel. They may also communicate with their staff assistants if those assistants do not "furnish, augment, diminish, or modify the evidence in the record." Second, if a proceeding is conducted with someone other than the agency head acting as the hearing officer, the administrative agency's counsel and the agency head may communicate on common attorney-client issues without notice and opportunity for other party participation. Except for settlement and negotiation, this second

exception does not extend to communication occurring after recommended findings of fact, conclusions of law, and orders have been issued.

***(b) Rulemaking.***

- The drafters of the 1981 Model State Administrative Procedure Act (81 MSAPA) placed few restraints on oral *ex parte* communications in rulemaking. They refused to prohibit such communication or even to require that such communications be included in the public record. They were convinced by the scholarly observations from Antonin Scalia. He urged: "An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of [the legislature] and the vitally concerned interest groups; and it will often be unable to fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record."

Charles H. Koch, Jr., *Section 6.12 Ex Parte, Integrity in the Administrative Process*, 2 Admin. L. & Prac. § 6.12 (2d ed.) (2007).

## CHAIRMAN'S RECOMMENDATIONS

Having reviewed the current requirements of Missouri law, and all of the comments, presentations and filings of the participants to this docket, Chairman Davis makes the following recommendations to be adopted by the Commission:

**RECORDS OF MEETINGS & COMMUNICATIONS**:

A. That the Commission affirm meeting calendars, telephone logs and email communications of the Public Service Commission are "open" records pursuant to Chapter 610, commonly referred to as "The Missouri Sunshine Law." To this end, meeting records shall be available upon request, as stated in Chapter 610.

B. That beginning February 1, 2008, or as soon as practicable, each public service Commissioner should maintain a "public" calendar and that such calendar should be made available to the public via the Internet and contain the following information:

(1) Identification of any meetings with any parties or their representatives to any current proceeding and any persons known to be a party to any future proceeding.

(2) Such meetings should be posted at least twenty-four hours in advance and there should be some statement identifying the parties in attendance and the purpose of the meeting so that interested persons are reasonably apprised of all issues to be discussed in advance of the meeting. If exigent circumstances exist and the public interest requires the scheduling of a meeting to occur on less than twenty-four hours notice, the Commissioner should notify the Office of Public Counsel in advance of the meeting and post the meeting notice with a statement as to the "good cause" for the meeting to occur.

(3) If the Commissioner is meeting with a party to a case currently pending before the Commission, any party to that case should be invited to attend the meeting.

C. That the Public Service Commission should broadcast all Commission meetings and hearings over the Internet, when technically feasible.

D. That the PSC should retain a court reporter so that the Commission, an individual Commissioner or any Commission employee may, in the event of an emergency affecting the public health safety and welfare of the state or for other good cause identified in the record, transcribe any meeting or phone call with a representative of any regulated utility, the Office of Public Counsel, or any

association or individual who wishes to meet with a Commissioner or Commission employee on less than twenty-four hour notice.

**REQUIRED DISCLOSURE OF MEETINGS & COMMUNICATIONS WITH ALL PARTIES TO PENDING CASES:**

E. When a case is filed with the Commission, any meetings or communications related to the performance of the Commission's duties that occur between a Commissioner or Commission employee, the Office of Public Counsel or any party, agent or representative of a party to that matter should be disclosed to all parties within 72 hours unless the matter has already been previously disclosed to all the parties. This requirement should apply to all participants in the meeting and regardless of whether or not the matter has been set for hearing.

**PRIOR PUBLIC NOTICE OF PSC EMPLOYEE MEETINGS:**

F. Prior to meeting with parties to PSC cases or persons likely to become parties to PSC cases or proceedings, all PSC employees, including commissioners, should provide public notice of the scheduled meeting at least twenty-four hours in advance in a manner designed to reasonably inform all interested persons of the meeting, the persons to be present and the purpose of the meeting.

**SCHEDULING OF MEETINGS WITH THE COMMISSION:**

G. When a regulated utility, the Office of Public Counsel, a party or potential party to any case or matter to be decided by the Commission seeks to schedule a meeting with a majority of the Commissioners for any reason, the person making the request should be required to make the request in the following format:

(1) Meeting requests should be made in writing and shall contain a complete agenda of all matters the party wishes to be

discussed in the meeting. Discussion of topics not listed on the agenda should be prohibited.

(2) All such meeting requests, whether in written or electronic format, should be available for public inspection under Chapter 610, the Missouri Sunshine Law.

(3) All scheduling requests should be made to the Chairman of the Commission who shall place the matter on an agenda for a Commission meeting, raise the matter as a scheduling item in an agenda meeting or reject the request in writing, stating the reasons for his rejection and notifying the other commissioners accordingly.

(4) The contents of discussions in such meetings should be documented by minutes, transcription or other appropriate audio or video recording device. Any materials distributed during the meeting should be designated as “open records” by the Commission unless designated as “highly confidential” by the party. Pursuant to existing statute, the Office of Public Counsel shall have access to all information labeled as “highly confidential” and may appeal that designation.

(5) All attempts to meet with members of the Commission individually in an effort to avoid these disclosure requirements or the application of Chapter 610, the Missouri Sunshine Law, should be prohibited.

H. Where a regulated utility, the Office of Public Counsel, any party to a current proceeding, their agent or assign, or any person or any entity with the intent to be a party in a future proceeding seeks to schedule a meeting with an individual commissioner or any commission employee regarding any matter related to the performance of the Commission's duties, that request should be made in the following format:

(1) Meeting requests should be in writing and shall include a summary of all topics to be discussed at the proposed meeting.

(2) All such meeting requests, whether in written or electronic format, should be available for public inspection under Chapter 610, the Missouri Sunshine Law.

(3) The contents of discussions in such meetings should be documented by minutes, transcription or other appropriate audio or video recording device. Any materials distributed during the meeting should be designated as "open records" by the Commission unless designated as "highly confidential" by the party. Pursuant to existing statute, the Office of Public Counsel shall have access to all information labeled as "highly confidential" and may challenge that designation pursuant to Commission Rule. The minutes or recording of those communications should be disclosed within 72 hours of the meeting.

**NOTICE OF "EXTERNAL COMMUNICATIONS":**

I. The Public Service Commission should adopt a public "notice" system designed to disclose communications regarding matters that do not fit the definition of "ex parte" communications, but relate to any other substantive policy issue affecting any of the parties in a currently pending proceeding before the Commission. The notice requirements of this provision should apply to all parties to a currently pending case and commissioners alike. Counsel for any party to a currently pending proceeding shall be responsible for insuring the compliance of their respective client or clients.

**ETHICS TRAINING REQUIREMENTS FOR PSC EMPLOYEES AND ATTORNEYS PRACTICING BEFORE THE COMMISSION:**

J. The Public Service Commission shall develop a three-hour training seminar designed to educate all employees and attorneys practicing before the Commission concerning all state laws, rules and regulations regarding ex-parte communications, gratuities and ethics requirements. This seminar should be approved by the Missouri Bar for CLE credit and offered free of charge to attorneys appearing before the Commission at least twice a year. Every commission employee should be required to complete this training as part of their orientation and to retake the class every three years. The Commission should transmit copies of the course curriculum and any revisions to the designated representatives of the Governor, the Attorney General, the President Pro Tem of the Missouri Senate and the Speaker of the House for their comment.

**SECURITIES AND EXCHANGE COMMISSION PROVISION:**

K. To assure compliance with Security and Exchange Commission regulations prohibiting the disclosure of forward looking information that could affect the value of company stock, requesting parting will be advised that *any and all* information provided to commissioners in meetings will be considered open records and available for public inspection unless specifically designated as "highly confidential". The party designating such information as "highly confidential" should have the burden of providing the Office of Public Counsel with a copy of the communication prior to, simultaneously or no later than 24 hours after presenting it to the Commissioner or Commission employee.

**AFFIRMATION THAT ALL COMMISSIONERS PARTICIPATING IN THE CASES EITHER ATTENDED THE HEARINGS OR READ THE TRANSCRIPT:**

L. Commissioners should be required to certify that they are in compliance with Section 536.080, RSMo 2000, prior to rendering or joining in rendering a final decision.

**THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER CODIFYING EXISTING CASE LAW ON THE JUDICIAL DISQUALIFICATION OF PUBLIC SERVICE COMMISSIONERS:**

M. To eliminate confusion and litigation, the General Assembly should codify existing case law on the standards necessary to disqualify a Public Service Commissioner in a case.

**THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER REQUIRING ALL PUBLIC SERVICE COMMISSIONERS TO MEET THE SAME BASIC QUALIFICATIONS AS JUDGES AS SET FORTH IN ARTICLE V, SECTION 21 OF THE MISSOURI CONSTITUTION:**

O. If Public Service Commissioners are to be held to the same standards as judges, Commissioners should be required to meet the qualifications set out in Article V, Section 21 of the Missouri Constitution.

**THE GENERAL ASSEMBLY MAY, AT THEIR DISCRETION, WANT TO CONSIDER THE RECOMMENDATION OF ITS STAFF AND CHANGE THE STRUCTURE OF THE COMMISSION TO THAT SIMILAR TO THAT OF THE ADMINISTRATIVE HEARING COMMISSION:**

P. The Legislature has removed the adjudicative function from various boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. A measure of the Commission's adjudicative authority would be transferred to the Commission's cadre of Regulatory Law Judges ("RLJs"), leaving the Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. The RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000.

## CONCLUSION

The Chairman wishes to extend his sincere thanks and appreciation to all participants in this docket, and believes the recommendations in this report will travel far to improve practice before the Commission and resolve concerns and clear up misconceptions about the regulatory process and its many intricacies and challenges.

This docket will remain open until at least January 31, 2008 for parties to file additional responses in regard to this matter, and the Chairman may issue a supplemental report further addressing these recommendations and other relevant matters in relation to this docket.

# APPENDIX

## APPENDIX A -- Relevant Statutes and Commission Rules

**Section 36.155, RSMo 2000**
**Political activities by state employees permitted--prohibited activities.**

1. An employee may take part in the activities of political parties and political campaigns.

2. An employee may not:

(1) Use the employee's official authority or influence for the purpose of interfering with the results of an election;

(2) Knowingly solicit, accept or receive a political contribution from any person who is a subordinate employee of the employee;

(3) Run for the nomination, or as a candidate for election, to a partisan political office; or

(4) Knowingly solicit or discourage the participation in any political activity of any person who has an application for any compensation, grant, contract, ruling, license, permit or certificate pending before the employing department of such employee or is the subject of, or a participant in, an ongoing audit, investigation or enforcement action being carried out by the employing department of such employee.

3. An employee retains the right to vote as the employee chooses and to express the employee's opinion on political subjects and candidates.

**Section 36.157, RSMo 2000**
**Prohibitions on political activities by state employees.**

An employee may not engage in political activity:

(1) While on duty;

(2) In any room or building occupied in the discharge of official duties;

(3) By utilizing any state resources or facilities;

(4) While wearing a uniform or official insignia identifying the office or position of the employee; or

(5) When using any vehicle owned or leased by the state or any agency or instrumentality of the state.

**Section 36.159, RSMo 2000**
**State employee not to be coerced into political activity--penalty.**

It shall be unlawful for any person to intimidate, threaten, command or coerce any employee of the state to engage in, or not to engage in, any political activity, including, but not limited to, voting, or refusing to vote, for any candidate or measure in any election, making, or refusing to make, any political contribution or working, or refusing to work, on behalf of any candidate. No employee of this state shall discriminate against, discipline or otherwise create a preference for or against any employee subject to such person's authority as a consequence of such employee's political belief or expression of such belief. Any person who violates the provisions of this section is guilty of a class three election offense as established in section 115.635, RSMo, punishable by a term of imprisonment for not more than one year and a fine of not more than two thousand five hundred dollars, or both such fine and imprisonment. Any person convicted of a violation of this section shall lose such person's position in the agency.

**Section 105.055, RSMo 2000**
**State employee reporting mismanagement or violations of agencies, discipline of employee prohibited--appeal by employee from disciplinary actions, procedure--disciplinary action defined --violation, penalties--civil action, when.**

1. No supervisor or appointing authority of any state agency shall prohibit any employee of the agency from discussing the operations of the agency, either specifically or generally, with any member of the legislature, state auditor, attorney general, or any state official or body charged with investigating such alleged misconduct.

2. No supervisor or appointing authority of any state agency shall:

(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:

(a) A violation of any law, rule or regulation; or

(b) Mismanagement, a gross waste of funds or abuse of authority, or a substantial and specific

danger to public health or safety, if the disclosure is not specifically prohibited by law; or

(2) Require any such employee to give notice to the supervisor or appointing authority prior to making any such report.

3. This section shall not be construed as:

(1) Prohibiting a supervisor or appointing authority from requiring that an employee inform the supervisor or appointing authority as to legislative requests for information to the agency or the substance of testimony made, or to be made, by the employee to legislators on behalf of the employee to legislators on behalf of the agency;

(2) Permitting an employee to leave the employee's assigned work areas during normal work hours without following applicable rules and regulations and policies pertaining to leaves, unless the employee is requested by a legislator or legislative committee to appear before a legislative committee;

(3) Authorizing an employee to represent the employee's personal opinions as the opinions of a state agency; or

(4) Restricting or precluding disciplinary action taken against a state employee if: the employee knew that the information was false; the information is closed or is confidential under the provisions of the open meetings law or any other law; or the disclosure relates to the employee's own violations, mismanagement, gross waste of funds, abuse of authority or endangerment of the public health or safety.

4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation.

5. Any employee may file an administrative appeal whenever the employee alleges that disciplinary action was taken against the employee in violation of this section. The appeal shall be filed with the state personnel advisory board; provided that the appeal shall be filed with the appropriate agency review board or body of nonmerit agency employers which have established appeal procedures substantially similar to those provided for merit employees in subsection 5 of section 36.390, RSMo. The appeal shall be filed within thirty days of the alleged disciplinary action. Procedures governing the appeal shall be in accordance with chapter 36, RSMo. If the board or appropriate review body finds that disciplinary action taken was unreasonable, the board or appropriate review body shall modify or reverse the agency's action and order such relief for the employee as the board

considers appropriate. If the board finds a violation of this section, it may review and recommend to the appointing authority that the violator be suspended on leave without pay for not more than thirty days or, in cases of willful or repeated violations, may review and recommend to the appointing authority that the violator forfeit the violator's position as a state officer or employee and disqualify the violator for appointment to or employment as a state officer or employee for a period of not more than two years. The decision of the board or appropriate review body in such cases may be appealed by any party pursuant to law.

6. Each state agency shall prominently post a copy of this section in locations where it can reasonably be expected to come to the attention of all employees of the agency.

7.

(1) In addition to the remedies in subsection 6 of this section, a person who alleges a violation of this section may bring a civil action for damages within ninety days after the occurrence of the alleged violation.

(2) A civil action commenced pursuant to this subsection may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides.

(3) An employee must show by clear and convincing evidence that he or she or a person acting on his or her behalf has reported or was about to report, verbally or in writing, a prohibited activity or a suspected prohibited activity.

(4) A court, in rendering a judgment in an action brought pursuant to this section, shall order, as the court considers appropriate, actual damages, and may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees.

**Section 105.058, RSMo 2000**
**State agencies and officials not to prohibit communications between employees and the state auditor or legislators, exceptions.**

No state agency and no state official, including the joint committee on legislative research and the oversight division, shall, by agency policy, executive order, ethics codes or any other means, prohibit any state employee from communicating with the state auditor or his or her state representative or state senator, nor shall such agency or official require any

such employee to provide any record or other information regarding any communications with the state auditor or his or her state representative or state senator, except when such communications are directly related to the primary employment duties of such employee.

**Section 105.150, RSMo 2000**
**No state officer or clerk to deal in state stocks--penalty.**

It shall not be lawful for the state treasurer or auditor, or any state officer or any clerk or employee of the state, to deal in any of the stocks or indebtedness of the state, at less than their par value, or any claim against the state, or to prosecute any claim against the state, under pain of forfeiting his office or place.

**Section 105.452, RSMo 2000**
**Prohibited acts by elected and appointed public officials and employees.**

No elected or appointed official or employee of the state or any political subdivision thereof shall:

(1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse or dependent children, including but not limited to increases in retirement benefits, whether received from the state of Missouri or any third party by reason of such act. For the purposes of this subdivision, "special monetary benefit" means being materially affected in a substantially different manner or degree than the manner or degree in which the public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected. In all such matters such officials must recuse themselves from acting and shall not be relieved by reason of the provisions of section

105.460, except that such official may act on increases in compensation subject to the restrictions of section 13 of article VII of the Missouri Constitution; or

(5) Use his decision-making authority for the purpose of obtaining a financial gain which materially enriches himself, his spouse or dependent children by acting or refraining from acting for the purpose of coercing or extorting from another anything of actual pecuniary value.

**Section 105.454, RSMo 2000**
**Additional prohibited acts by certain elected and appointed public officials and employees, exceptions.**

No elected or appointed official or employee of the state or any political subdivision thereof, serving in an executive or administrative capacity, shall:
(1) Perform any service for any agency of the state, or for any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power for receipt or payment of any compensation, other than of the compensation provided for the performance of his or her official duties, in excess of five hundred dollars per transaction or five thousand dollars per annum, except on transactions made pursuant to an award on a contract let or sale made after public notice and competitive bidding, provided that the bid or offer is the lowest received;

(2) Sell, rent or lease any property to any agency of the state, or to any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power and received consideration therefor in excess of five hundred dollars per transaction or five thousand dollars per year, unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(3) Participate in any matter, directly or indirectly, in which he or she attempts to influence any decision of any agency of the state, or political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power, when he or she knows the result of such decision may be the acceptance of the performance of a service or the sale, rental, or lease of any property to that agency for consideration in excess of five hundred dollars' value per transaction or five thousand dollars' value per annum to him or her, to his or her spouse, to a dependent child in his or her custody or to any business with which he or she is associated unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(4) Perform any services during the time of his or her office or employment for any consideration from any person, firm or corporation, other than the

compensation provided for the performance of his or her official duties, by which service he or she attempts to influence a decision of any agency of the state, or of any political subdivision in which he or she is an officer or employee or over which he or she has supervisory power;

(5) Perform any service for consideration, during one year after termination of his or her office or employment, by which performance he or she attempts to influence a decision of any agency of the state, or a decision of any political subdivision in which he or she was an officer or employee or over which he or she had supervisory power, except that this provision shall not be construed to prohibit any person from performing such service and receiving compensation therefor, in any adversary proceeding or in the preparation or filing of any public document or to prohibit an employee of the executive department from being employed by any other department, division or agency of the executive branch of state government. For purposes of this subdivision, within ninety days after assuming office, the governor shall by executive order designate those members of his or her staff who have supervisory authority over each department, division or agency of state government for purposes of application of this subdivision. The executive order shall be amended within ninety days of any change in the supervisory assignments of the governor's staff. The governor shall designate not less than three staff members pursuant to this subdivision;

(6) Perform any service for any consideration for any person, firm or corporation after termination of his or her office or employment in relation to any case, decision, proceeding or application with respect to which he or she was directly concerned or in which he or she personally participated during the period of his or her service or employment.

**Section 105.462, RSMo 2000**
**Prohibited acts by persons with rulemaking authority--appearances --exceptions.**

1. No member of any agency of the state or any political subdivision thereof who is empowered to adopt a rule or regulation, other than rules and regulations governing the internal affairs of the agency, or who is empowered to fix any rate, adopt zoning or land use planning regulations or plans, or who participates in or votes on the adoption of any such rule, regulation, rate or plan shall:

(1) Attempt to influence the decision or participate, directly or indirectly, in the decision of the agency in which he or she is a member when he or she knows the result of such decision may be the adoption of rates or zoning plans by the agency which may result in a direct financial gain or loss to him or her, to his or her spouse or a dependent child in his or her custody or to any business with which he or she is associated;

(2) Perform any service, during the time of his or her employment, for any person, firm or corporation for compensation other than the compensation provided for the performance of his or her official duties, if by the performance of the service he or she attempts to influence the decision of the agency of the state or political subdivision in which he or she is a member;

(3) Perform for one year after termination of his or her employment any service for compensation for any person, firm or corporation to influence the decision or action of the agency with which he or she served as a member; provided, however, that he or she may, after termination of his or her office or employment, perform such service for consideration in any adversary proceeding or in the preparation or filing of any public document or conference thereon unless he or she participated directly in that matter or in the receipt or analysis of that document while he or she was serving as a member.

2. No such member or any business with which such member is associated shall knowingly perform any service for, or sell, rent or lease any property to any person, firm or corporation which has participated in any proceeding in which the member adopted, participated in the adoption or voted on the adoption of any rate or zoning plan or the granting or revocation of any license during the preceding year and received therefor in excess of five hundred dollars per transaction or one thousand five hundred dollars per annum except on transactions pursuant to an award on contract let or of sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received.

**Section 105.464, RSMo 2000**
**Prohibited acts by persons in judicial or quasi-judicial positions.**

1. No person serving in a judicial or quasi-judicial capacity shall participate in such capacity in any proceeding in which the person knows that a party is any of the following: the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin.
2. No provision in the section shall be construed to prohibit him from entering an order disqualifying himself or herself or transferring the matter to another court, body, or person for further proceedings.

**Section 105.467, RSMo 2000**
**Discharge and discrimination prohibited, reasons--reinstatement.**

1. A governmental body, state agency or appointing authority shall not discharge, threaten, or otherwise discriminate against a person or state employee acting on behalf of a person regarding compensation, terms, conditions, location, or privileges of employment because:

(1) The person or state employee acting on behalf of the person reports or is about to report, verbally or in writing, a violation or a suspected violation of sections 105.450 to 105.498; or

(2) A person or state employee acting on behalf of the person is requested by the commission to participate in an investigation, hearing, or inquiry held by the commission or any related court action.

This subsection shall not apply to a person or state employee acting on behalf of a person who knowingly or recklessly makes a false report.

2. A person or state employee acting on behalf of a person who alleges a violation of subsection 1 of this section may bring a civil action for appropriate injunctive relief, or actual damages, or both.

3. A court, in rendering a judgment in an action brought pursuant to this section, shall order, as the court considers appropriate, reinstatement of the person or state employee acting on behalf of the person, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award such person all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, if the court determines that the award is appropriate.

**Section 386.050, RSMo 2000**
**Appointment of commissioners--qualifications--tenure.**

The commission shall consist of five members who shall be appointed by the governor, with the advice and consent of the senate, and one of whom shall be designated by the governor to be chair of the commission. Each commissioner, at the time of the commissioner's appointment and qualification, shall be a resident of the state of Missouri, and shall have resided in the state for a period of at least five years next preceding the appointment and qualification, and shall also be a qualified voter therein and not less than twenty-five years of age. Upon the expiration of each of the terms of office of the first commissioners, the term of office of each commissioner thereafter appointed shall be six years from the time of the commissioner's appointment and qualification and until his successor shall

qualify. Vacancies in the commission shall be filled by the governor for the unexpired term.

**Section 386.060, RSMo 2000**
**Removal of commissioners.**

The governor may remove any commissioner for inefficiency, neglect of duty, or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings. The legislature also shall have the power, by a two-thirds vote of all members elected to each house, after ten days' notice in writing of the charges and a public hearing, to remove any one or more of said commissioners from office for dereliction of duty, or corruption, or incompetency.

**Section 386.135, RSMo 2000**
**Independent technical staff for commission authorized, qualifications--personal advisors permitted--corresponding elimination of positions required--duties of technical staff.**

1. The commission shall have an independent technical advisory staff of up to six full-time employees. The advisory staff shall have expertise in accounting, economics, finance, engineering/utility operations, law, or public policy.

2. In addition, each commissioner shall also have the authority to retain one personal advisor, who shall be deemed a member of the technical advisory staff. The personal advisors will serve at the pleasure of the individual commissioner whom they serve and shall possess expertise in one or more of the following fields: accounting, economics, finance, engineering/utility operations, law, or public policy.

3. The commission shall only hire technical advisory staff pursuant to subsections 1 and 2 of this section if there is a corresponding elimination in comparable staff positions for commission staff to offset the hiring of such technical advisory staff on a cost-neutral basis. Such technical advisory staff shall be hired on or before July 1, 2005.

4. It shall be the duty of the technical advisory staff to render advice and assistance to the commissioners and the commission's administrative law judges on technical matters within their respective areas of expertise that may arise during the course of proceedings before the commission.

5. The technical advisory staff shall also update the commission and the commission's administrative law judges periodically on developments and

trends in public utility regulation, including updates comparing the use, nature, and effect of various regulatory practices and procedures as employed by the commission and public utility commissions in other jurisdictions.

6. Each member of the technical advisory staff shall be subject to any applicable ex parte or conflict of interest requirements in the same manner and to the same degree as any commissioner, provided that neither any person regulated by, appearing before, or employed by the commission shall be permitted to offer such member a different appointment or position during that member's tenure on the technical advisory staff.

7. No employee of a company or corporation regulated by the public service commission, no employee of the office of public counsel or the public counsel, and no staff members of either the utility operations division or utility services division who were an employee or staff member on, during the two years immediately preceding, or anytime after August 28, 2003, may be a member of the commission's technical advisory staff for two years following the termination of their employment with the corporation, office of public counsel or commission staff member.

8. The technical advisory staff shall never be a party to any case before the commission.

**Section 386.200, RSMo 2000**
**Conflicts of interest by commissioner or employees of commission prohibited--penalty for violation--violation by utility, penalty --violation by officer of utility, penalty.**

1. Every commissioner, the public counsel and every person employed or appointed to office, either by the commission or by the public counsel, is hereby forbidden and prohibited to solicit, suggest, request or recommend, directly or indirectly, to any public utility, corporation or person subject to the supervision of the commission, or to any officer, attorney, agent or employee thereof, the appointment of any person to any office, place, position or employment. And every such public utility, corporation and person, and every officer, attorney, agent and employee thereof, is hereby forbidden and prohibited to offer to any commissioner, the public counsel, or to any person employed by the commission or by the public counsel, any office, place, appointment or position, or to offer or give to any commissioner, to the public counsel, or to any person employed or appointed to office by the commission or by the public counsel, any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for property or any present, gift, entertainment or gratuity of any kind.

2. If any commissioner, the public counsel, or any person employed or appointed to office by the commission or the public counsel, shall violate any provision of this section he shall be removed from the office held by him.

Every commissioner, the public counsel, and every person employed or appointed to office by the commission, or by the public counsel, shall be and be deemed to be a public officer.

3. If any public utility violates any provision of this section, it shall be liable to the state of Missouri in a civil action in any court of competent jurisdiction for the assessment of a civil penalty not to exceed twenty thousand dollars. The penalty provided in this subsection shall be in addition to any other penalty provided for violation of the provisions of this chapter. The attorney general shall bring the action authorized in this subsection. The action may be brought in any county where the defendant public utility's principal place of business is located or where the violation occurred, or where the public utility's registered agent is located. The penalty assessed under the provisions of this subsection shall be paid into the state treasury to the credit of general revenue.

4. Any officer, agent or employee of any public utility who violates any provision of this section is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

**Section 386.210, RSMo, Cum. Supp. 2006**
**Conferences, limitations on communications – cooperative agreements, investigations authorized – funds may be received and distributed, how --.**

1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.

2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.

3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:

(1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;

(2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or

(3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:

(a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;

(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

6. The commission may enter into and establish fair and equitable cooperative agreements or contracts with or act as an agent or licensee for the United States of America, or any official, agency or instrumentality thereof, or any public utility or similar commission of other states, that are proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties

pursuant to section 386.250 as limited and supplemented by section 386.030 and to that end the commission may receive and disburse any contributions, grants or other financial assistance as a result of or pursuant to such agreements or contracts. Any contributions, grants or other financial assistance so received shall be deposited in the public service commission utility fund or the state highway commission fund depending upon the purposes for which they are received.

7. The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

**Section 386.510, RSMo 2000**
**Review by circuit court.**

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (herein referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined. The writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day the cause shall be heard by the circuit court, unless for a good cause shown the same be continued. No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review. In case the order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. No

court in this state, except the circuit courts to the extent herein specified and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity.

**Section 386.540, RSMo 2000**
**Appeals from circuit court--transcript and exhibits--precedence over other civil cases.**

1. The commission and any party, including the public counsel, who has participated in the commission proceeding which produced the order or decision may, after the entry of judgment in the circuit court in any action in review, prosecute an appeal to a court having appellate jurisdiction in this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this chapter. The original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the supreme court or any court of appeals.

2. Where an appeal is taken to the supreme court or the court of appeals, the cause shall, on the return of the papers to the supreme court or court of appeals, be immediately placed on the docket of the then pending term by the clerk of the court and shall be assigned and brought to a hearing in the same manner as other causes on the then pending term docket, but shall have precedence over all civil causes of a different nature pending in the court. No appeal shall be effective when taken by a corporation, person or public utility unless a cost bond of appeal in the sum of five hundred dollars shall be filed within ten days after the entry of judgment in the circuit court appealed from.

3. The circuit court may in its discretion suspend its judgment pending the hearing in the supreme court or court of appeals on appeal, upon the filing of a bond by the corporation, person or public utility with good and sufficient security conditioned as provided for bonds upon actions for review and by further complying with all terms and conditions of this law for the suspension of any order or decision of the commission pending the hearing or review in the circuit court. This bond shall be in addition to the cost bond heretofore provided in this section.

4. The general laws relating to appeals to the supreme court and the court of appeals in this state shall, so far as applicable and not in conflict with the provisions of this chapter, apply to appeals taken under the provisions of this chapter.

**Commission Rule 4 CSR 240-4.010**
**Chapter 4—Standards of Conduct 4 CSR 240-4.010 Gratuities**

*PURPOSE: The commission is obligated to promote the public interest and maintain public confidence in its integrity and impartiality. This rule prescribes measures to prohibit practices that possess a potential of wrongdoing.*

(1) Each member of the commission and all of its employees are directed to read and comply with this rule and with Executive Order 92-04 dated January 31, 1992 following, which sets forth a standard of conduct for appointed officials and state employees. The commission shall be responsible for the enforcement of applicable statutes, the provisions of the Executive Order and this rule by the suspension or discharge of employees violating the same.

(2) All companies, corporations or individuals and any representative subject to the jurisdiction of the commission shall be prohibited from offering and all members and employees of the commission shall not accept, directly or indirectly, any gifts, meals, gratuities, goods, services or travel, regardless of value, except meals to a commissioner or an employee of the commission when given in connection with a speaking engagement or when the individual is a guest at a conference, convention or association meeting.

(3) All companies, corporations or individuals and any representative subject to the jurisdiction of this commission, and the members and employees of the commission shall immediately file with the chairman and each member of the commission, from and after March 18, 1976, report of any direct or indirect gratuities, meals, services, gifts or travel given or received and the identity and value of same and the purpose for which given or received, which is not permitted by this rule.

*AUTHORITY: section 386.040, RSMo 1986.* Original rule filed May 2, 1973, effective June 1, 1973. Amended: Filed Nov. 7, 1984, effective Feb. 11, 1985. *Original authority: 386.040, RSMo 1939.*

EXECUTIVE ORDER 92-04

WHEREAS, public confidence in the integrity of the government of the State of Missouri is of utmost importance; and

WHEREAS, the executive branch of state government must discharge its duties in an independent and impartial manner; and

WHEREAS, executive branch employees must treat the public and fellow employees with respect, courtesy, and dignity, and provide equal access to services for all members of the public; and

WHEREAS, executive branch employees' conduct not only must be within the letter of the law but must seek to fulfill the spirit and intent of the law; and

WHEREAS, executive branch employees must provide a full day's work for a full day's pay, giving to the performance of their duties their earnest effort and best thought; and

WHEREAS, executive branch employees must demonstrate the highest standards of personal integrity and honesty and must not realize undue personal gain from the performance of any official duties; and

WHEREAS, executive branch employees are responsible for enhancing the mission of their agencies; and

WHEREAS, a clear statement of the code of conduct which guides the executive branch is both an assurance to the citizens of Missouri and an aid to our steadfast efforts;

NOW, THEREFORE, I, JOHN ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI, UNDER THE AUTHORITY VESTED IN ME UNDER THE CONSTITUTION AND THE LAWS OF THIS STATE, INCLUDING THE PROVISIONS OF SECTION 105.969 RSMO CUM. SUPP. 1992, DO HEREBY SET FORTH A CODE OF CONDUCT FOR EXECUTIVE BRANCH EMPLOYEES OF MISSOURI STATE GOVERNMENT (EXCEPTING THE EMPLOYEES OF THOSE ELECTED OFFICIALS WHO ARE TO ESTABLISH AN INTERNAL CODE OF CONDUCT FOR THEIR OFFICES):

CODE OF CONDUCT

1. Executive branch employees shall conduct the business of state government in a manner which inspires public confidence and trust.

A. Employees shall avoid any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of their official duties.

B. Employees shall act impartially and neither dispense nor accept special favors or privileges which might be construed to improperly influence the performance of their official duties.

C. Employees shall not allow political participation or affiliation to improperly influence the performance of their duties to the public.

D. Employees shall not engage in business with state government, hold financial interests, or engage in outside employment when such actions are inconsistent with the conscientious performance of their official duties.

E. Employees shall not use or improperly possess an illegal controlled substance or alcohol in the workplace or during working hours.

F. Employees of the State are expected to comply with the statutes of Missouri at all times.

2. Executive branch employees shall conduct themselves in scrupulous compliance with applicable federal, state and local law.

A. Employees shall observe all conflict of interest provisions in law applicable to their agencies and positions of employment.

B. Employees shall adhere to all laws providing equal opportunity to all citizens.

C. Employees shall perform their responsibilities as they are specified in law or other authority establishing those responsibilities.

3. Financial compensation of state employment consists of only authorized salaries and fringe benefits.

A. Employees shall not use their public positions in a manner designed to create personal gain.

B. Employees shall not disclose confidential information gained by reason of their public positions, nor shall employees use such information for personal gain or benefit.

C. Employees shall not directly or indirectly attempt to influence agency decisions in matters relating to prospective employers with whom employment has been accepted or is being negotiated.

4. Executive branch employees owe the public the diligent application of their knowledge, skills and abilities for which they are compensated.

A. Employees shall not perform outside employment or other activities not appropriate during hours compensated for state employment and will use leave and other benefits provided by the State only for the purposes intended.

B. Employees shall carry out all lawful instructions of designated supervisors, and will report instructions not consistent with law to the proper authorities.

5. Equipment, material and supplies purchased with public funds are intended for the performance of public purposes only.

A. Employees shall use and maintain state equipment, materials and supplies in an efficient manner which will conserve future usefulness.

B. Employees shall use state equipment, materials and supplies solely for purposes related to the performance of state business.

6. The work of state government will be conducted with respect, concern and courtesy toward clients, co-workers and the general public.

A. Employees shall approach their duties with a positive attitude and constructively support open communication, dedication and compassion.

B. Employees shall conduct their duties with courtesy toward clients, co-workers, patients, inmates and the general public, recognizing the diverse background, characteristics and beliefs of all those with whom they conduct state business.

C. Employees shall not engage in any form of illegal harassment or discrimination in the workplace, including on the basis of race, color, religion, national origin, ancestry, sex, age or disability.

D. Employees, in connection with the performance of their duties, shall not seek sexual favors from a client, co-worker, patient, inmate or member of the public.

7. This code shall provide guidance to the officials and employees of the executive branch of Missouri state government in matters of employment related conduct.

A. When questions arise in the application of this code, the public interest will receive primary consideration in any resolution.

B. This code is not intended to fully prescribe the proper conduct of employees and the failure to prohibit an employee action in this code does not constitute approval of the action.

C. This code is intended as a supplement to the provisions in law which govern employee conduct, and in no instance does it decrease the requirements in law.

D. Agency heads are responsible for promoting and enforcing this code of conduct among the employees of their agencies in accordance with their respective agency procedures, and shall supplement it with additional provisions to meet the needs of their agencies.

E. This code is intended to provide guidance for employment related conduct and is not intended to create any right or benefit enforceable by law.

F. No state agency or appointing authority shall discharge, threaten or otherwise retaliate against an employee for reporting in good faith any violation of this code.

G. In applying this code to specific situations, the standard to be used is that of a reasonable person having knowledge of the pertinent circumstances.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, this 31st day of January, 1992.
(Signature) _____
GOVERNOR
ATTEST
(Signature) _____
SECRETARY OF STATE

**Commission Rule 4 CSR 240-4.020**
**4 CSR 240-4.020 Conduct During Proceedings**

*PURPOSE: The commission must insure that there is no question as to its impartiality in reaching a decision on the whole record developed during open hearings. This rule prohibits activities which would tend to exercise influence on the commission and which are not part of the record. Editor's Note: The secretary of state has determined that the publication of this rule in its entirety would be unduly cumbersome or expensive. The entire text of the material referenced has been filed with the secretary of state. This material may be found at the Office of the Secretary of State or at the headquarters of the agency and is available to any interested person at a cost established by state law.*

(1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

(A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not

make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

1. Evidence regarding the occurrence of transaction involved;

2. The character, credibility or criminal record of a party, witness or prospective witness;

3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;

4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the

proceeding. (5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.

(7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.

(8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

*AUTHORITY: section 386.410, RSMo 1986.* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26,1976, effective Sept. 11, 1976. *Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

## APPENDIX B -- The Judicial Canons

### Supreme Court Rule 2 –The Code of Judicial Conduct

### Rule 2.01. Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Rule 2 are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements and specific rules of conduct called Canons contained in Rule 2.03, a terminology section contained in Rule 2.02, and a compliance section contained in Rule 2.04 and commentary. The text of the Canons, the terminology and compliance sections are authoritative. The commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons. The commentary is not intended as a statement of additional rules.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. This Rule 2 is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

This Rule 2 is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of this Rule 2 would be subverted if it were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

This Rule 2 is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. This Rule 2 is intended, however, to state basic standards that should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.02. Terminology**

(a) "Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Canons 3D(1) and 3D(2).

(b) "Candidate" is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions of support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office. See Rule 2.01 and Canon 5.

(c) "Court personnel" are reporters, clerks, bailiffs and office personnel performing duties in a proceeding before a judge but are not lawyers representing litigants. See Canons 3B(7)(c) and 3B(9).

(d) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Canons 3E(1)(c) and 3E(1)(d).

COMMENTARY

Section 105.464, RSMo, provides criminal culpability where a judge knows that the subject matter of any proceeding is such that the judge may receive a direct or indirect financial gain from any potential result proceeding. If section 105.464 is read in its broadest intendment, any case could conceivably result in at least some insignificant direct or indirect benefit to the judge. The rule of necessity obviates such a result. Direct or indirect benefit as used in section 105.464 does not include any de minimis interest as defined by this Rule 2.02(d).

(e) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities;

(5) ownership of small amounts of publicly traded corporations is not an economic interest unless a proceeding pending or impending before the judge could substantially affect the value of the shares.

See Canons 3E(1)(c) and 3E(2).

(f) "Fiduciary" includes such relationships as personal representative, executor, administrator, trustee, attorney-in-fact under power of attorney, and guardian. See Canons 3E(2) and 4E.

(g) "Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Canons 3D and 3E(1).

(h) "Law" denotes court rules as well as applicable constitutional provisions, statutes, ordinances and decisional and other law. See Canons 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4E, 4F, and 4I.

(i) "May" denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

(j) "Member of the candidate's family" or "member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or

person with whom the candidate maintains a close familial relationship. See Canons 4D(3), 4E(1), 4G, and 5B(1)(a).

(k) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Canons 3E(1) and 4D(3).

(l) "Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statutes or court order, impounded, or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports. See Canon 3B(11).

(m) "Part-time judge" is a judge who serves on a continuing or periodic basis but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge.

(n) "Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Canon 5.

(o) "Require" The rules prescribing that a judge "require" certain conduct of others are, like all provisions of this Rule 2, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Canon 3.

(p) "Shall" or "shall not" intends to impose binding obligations the violation of which can result in disciplinary action.

(q) "Should" or "should not" is intended as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. Such conduct shall not be the subject of discipline under any other provision that uses the terms "shall" or "shall not."

(r) "Subject to the requirements of this Rule 2" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Canons of this Rule 2 does not relieve a judge from the other requirements of the Canons of this Rule 2 that apply to the specific conduct.

(s) "Third degree of relationship" The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Canon 3E(1)(d) and 4E(1).

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.03. Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary**

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Rule 2 are to be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting promptly, courteously and without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Rule 2. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Rule 2 diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.03. Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities**

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is

harmful although not specifically mentioned in this Rule 2. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Rule 2. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

COMMENTARY

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as preferential treatment when stopped by a police officer for a traffic offense.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Canon 4D(5)(a) and the commentary thereto.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication or information to a sentencing judge or a probation or corrections officer but may provide such information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.03. Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

A. Judicial Duties in General. The judicial duties of a judge take precedent over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers and of staff, court officials and others subject to the judge's direction and control.

COMMENTARY

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age, and

shall not permit staff, court officials and others subject to the judge's direction and control to do so.

COMMENTARY

A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in open court or in chambers to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, sexual orientation, religion, national origin, disability or age against parties, witnesses, counsel or others. This Canon 3B(6) does not preclude legitimate advocacy when race, sex, sexual orientation, religion, national origin, disability or age or other similar factors are issues in the proceeding.

COMMENTARY

Legal interpretations of Title VII of the Civil Rights Act of 1964 provide useful guidance in interpreting the provisions of Canon 3B(5) and (6). Sexual harassment is defined as illegal sex discrimination pursuant to Title VII in the context of employment relationships. A judge must refrain from speech, gestures or other conduct that reasonably could be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. 'Sexual harassment' constitutes misconduct whether the conduct is in an employment relationship or in a nonemployment relationship manifested in the course of the performance of judicial duties.

"Sexual harassment" denotes:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;

(2) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or

(3) such conduct has the purpose or effect of unreasonably interfering with

an individual's work performance or of creating an intimidating, hostile or offensive environment.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Canon 3B(7), it is the party's lawyer, or if the party is underrepresented, the party,

who is to be present or to whom notice is to be given. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Canon 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Canon 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Canon 3B(7)(a) and Canon 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Canon 3B(7) is not violated through law clerks or other personnel on the judge's staff.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

COMMENTARY

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of

court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court.

COMMENTARY

This requirement continues during any appellate process and until final disposition. This Canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

COMMENTARY

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall

avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENTARY

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Canon 3C(4) .

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Rule 2 should take appropriate action. A judge having knowledge that another judge has committed a violation of this Rule 2 that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of Rule 4 should take appropriate action. A judge having knowledge that a lawyer has committed a violation of Rule 4 that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Canon 3D(1) or Canon 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

COMMENTARY

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Recusal.

(1) A judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

COMMENTARY

Under this Canon 3E(1), a judge is disqualified whenever the judge's impartiality might reasonably be question, regardless whether any of the specific rules in Canon 3E(1) apply. For example, if a judge was in the

process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

A judge ordinarily required to recuse as a result of the proscriptions of this Canon 3E need not do so in a default proceeding.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

COMMENTARY

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Canon 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest, that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' under Canon 3E(1) or that the relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Canon 3E may disclose on the record the basis of the disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

A remittal procedure provides the parties an opportunity to proceed without undue delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in this Canon 3F. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999. Amended November 25, 2003, eff. January 1, 2004.)*

**Rule 2.03. Canon 4. A Judge Shall So Conduct the Judge's Extrajudicial Activities as to Minimize the Risk of Conflict With Judicial Obligations**

A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extrajudicial activities so that they do not:
(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

COMMENTARY

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and nonlegal subjects, subject to the requirements of this Rule 2.

COMMENTARY

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

See Canon 2B regarding the obligation to avoid improper influence.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

COMMENTARY

Canon 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Canon 4C(3). The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary. Canon 4C(2) does not govern a judge's service in a nongovernmental position. See Canon 4C(3) permitting service in a nongovernmental position. See Canon 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civil organizations not conducted for profit. For example, service on the board of a public educational institution, unless it was a law school, would be prohibited under Canon 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Canon 4C(3).

(3) A judge may serve as an officer, director, trustee or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Rule 2.

COMMENTARY

Canon 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Canon 4C(2).

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Canon 4C. For example, a judge is prohibited by Canon 4G from serving as a legal advisor to a civic or charitable organization.

(a) A judge shall not serve as an officer, director, trustee or nonlegal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

COMMENTARY

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(b) A judge as an officer, director, trustee or nonlegal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds but shall not personally participate in the solicitation of funds or other fund raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

COMMENTARY

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system

or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships from other judges over whom the judge does not exercise supervisory or appellate authority; 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest investments and other financial interests that might require frequent disqualification.

COMMENTARY

This Canon does not prohibit a judge from serving on the board of a private corporation, including a financial institution, as long as such activity does not violate the intent of this Rule 2 and provided that judicial title or office shall not be shown or used in connection with the judge's name or position with the corporation.

(3) Neither a judge nor a member of the judge's family residing in the household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for office use; or an invitation to the judge and the judge's spouse to attend a bar-related function

or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of the judge's family residing in the household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of the judge's family residing in the household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 4H.

COMMENTARY

This Canon does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

(4) A judge is not required by this Rule 2 to disclose income, debts, or investments, except as provided in this Canon, Canon 3, and Canon 4H.

COMMENTARY

Canon 3 requires a judge to recuse in any proceeding in which the judge has more than a de minimis interest that could be substantially affected by the proceeding; Canon 4D requires a judge to refrain from engaging in business and financial activities that might interfere with the impartial performance of judicial duties; Canon 4H requires a judge to report all compensation received by the judge for activities outside the judge's judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of judicial duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(5) Information acquired by a judge in a judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator, other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, providing such

person is the judge's spouse or within the third degree of relationship to the judge or the judge's spouse, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

COMMENTARY

Rule 2.05 postpones the time for compliance with certain provisions of this Canon 4E in some cases.

The restrictions imposed by this Canon 4 may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Canon 4D(4).

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

COMMENTARY

Canon 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

COMMENTARY

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Canon 2B. Rule 2 allows a judge to give legal advice to and draft legal documents for

members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family by appearance in a court proceeding.

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Rule 2, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The report shall be made at least annually and shall be filed as a public document in the office of the clerk of this Court.

COMMENTARY

See Canon 4D(3) regarding reporting of gifts, bequests and loans. Rule 2 does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon 4, in Canon 3E, and in Canon 3F, or as otherwise required by law.

COMMENTARY

Canon 3E requires a judge to recuse in any proceeding in which the judge has an economic interest. See "economic interest" as defined in Rule 2.02. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Canon 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.03. Canon 5. A Judge and Certain of the Judge's Employees Shall Refrain From Inappropriate Political Activity**

A. Political Conduct in General.

(1) No judge appointed to or retained in office in the manner prescribed in section 25(a)-(g) of article V of the state constitution shall directly or indirectly make any contribution to or hold any office in a political party or organization or take part in any political campaign.

(2) Where it is necessary that a judge be nominated and elected as a candidate of a political party, an incumbent judge or candidate for election to judicial office may attend or speak on the judge or candidate's own behalf at political gatherings and may make contributions to the campaign funds of the party of choice. However, neither the judge nor the candidate shall accept or retain a place on any party committee or act as party leader or solicit contributions to party funds.

(3) A judge shall resign judicial office when the judge becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law to do so.

(4) A judge shall not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

(5) Persons appointed as a circuit or associate circuit judge selected pursuant to section 25(a)-(g) of article V of the state constitution and their employees shall not directly or indirectly make any contributions to or hold an office in a political party or organization or take part in any political campaign.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of the non-partisan court plan:
(a) shall maintain the dignity appropriate to judicial office and shall encourage members of the candidate's family to adhere to the same standards of political conduct that apply to the candidate;

(b) shall prohibit public officials or employees subject to the candidate's direction or control from doing for the candidate what the candidate is prohibited from doing under this Canon 5; and except to the extent authorized under Canon 5B(2) or Canon 5B(3), such candidate shall not allow any other person to do for the candidate what the candidate is prohibited from doing under this Canon 5;

(c) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office or misrepresent the candidate's identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds in a courthouse or on courthouse grounds. Such candidate shall not solicit in person campaign funds from persons likely to appear before the judge. A candidate may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge.

The candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign. Such committees are not prohibited from soliciting campaign contributions in person and may distribute the candidate's written requests for campaign funds.

A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

(3) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Canon 5B(2).

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999. Amended April 27, 1999, eff. July 1, 1999. Amended May 2, 2006, eff. May2, 2006.)*

**Rule 2.04. Compliance with the Code of Judicial Conduct**

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a special master, court commissioner, or magistrate, is a judge for the purpose of this Rule 2. All judges, except part-time judges, shall comply with this Rule 2.

A part-time judge:

(1) is not required to comply with Canon 4 or Canon 5 except while serving as a senior judge;

(2) who is also a senior judge is not required to comply with Canon 4H(2); and

(3) shall not practice law in the court on which the part-time judge serves or in any court subject to the appellate jurisdiction of the court on which the part-time judge serves or act as a lawyer in a proceeding in which the part-time judge has served as a judge or in any other proceeding related thereto.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

**Rule 2.05. Effective Date of Compliance**

A person to whom this Rule 2 becomes applicable should arrange the person's affairs as soon as reasonably possible to comply with it. If, however, the demands on time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Rule 2 becomes effective may continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the family.

*(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)*

## APPENDIX C – Roundtable Exhibits

### Table of Exhibits

EXHIBIT 1



**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

| | | |
|---|---|---|
| In the Matter of the Proposed Revision to 4 CSR 240-4.020 | ) ) | Case No. AX-2008-_____ |

## MOTION FOR PROPOSED RULEMAKING

COME NOW, the Office of the Public Counsel, Praxair, Inc., AG Processing, Inc., the Midwest Gas Users Association,[1] the Sedalia Energy Users Association,[2] the Missouri Industrial Energy Consumers,[3] the Missouri Energy Group,[4] AARP, and the Consumers Council of Missouri (collectively referred to as "Petitioners"), by and through their undersigned counsel, and for their Motion For Proposed Rulemaking, respectfully state as follows:

1. Recent events that have occurred in Case Nos. ER-2007-0291 and EM-2007-0374 have raised issues regarding improprieties associated with *ex parte* communications between utility executives and Commissioners. Indeed, in response to

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[1] The Midwest Gas Users Association ("MGUA") members are EnerSys Inc., ThyssenKrupp, Stahl Co., Wire Rope Corporation of America, North Kansas City Hospital, Archer Daniels Midland Corporation, AAA Uniform Service, and National Starch and Chemical, a division of ICI Inc.

[2] The Sedalia Energy Users Association ("SIEUA") members are Pittsburgh Corning Corporation, Waterloo Industries, Hayes-Lemmerz International, EnerSys Inc., Alcan Cable Co., Gardner Denver Corporation, American Compressed Steel Corporation, and ThyssenKrupp Stahl Company.

[3] The Missouri Industrial Energy Consumers ("MIEC") are Anheuser-Busch, BioKyowa, The Boeing Company, Cargill, Chrysler, Doe Run, Ford Motor Company, Enbridge, Explorer Pipeline, General Motors, GKN Aerospace, Hussmann Refrigeration, JW Aluminum, Monsanto, National Starch, Nestle Purina, Pfizer, Precoat Metals, Procter & Gamble, and U.S. Silica.

[4] The Missouri Energy Group ("MEG") members are Barnes-Jewish Hospital, Buzzi Unicem USA, Inc., Holcim US, Inc., and SSM HealthCare.

the appearance of impropriety, the Governor has called upon the Commission "to review their policies on conflicts of interest."

2. Modifications to the Commission's current rule, 4 CSR 240-4.020, should help clarify the procedures by which the Commission may engage in communications with parties or those companies and individuals that are likely to seek Commission action. By making these changes to the current rule, the Commission, consistent with the Governor's request, can ensure that utility matters are being decided "fairly and impartially."

3. Consistent with these goals, the parties have proposed the attached modifications to 4 CSR 240-4.020.

4. Pursuant to 4 CSR 240-2.180(3)(A)4, Petitioners state that the Commission has authority under Sections 386.250 and 386.410 RSMo 2000 to adopt the proposed amendments. Pursuant to 4 CSR 240-2.180(3)(A)5, Petitioners state that there will be no fiscal impacts to any entities from the proposed amendments.

WHEREFORE, Petitioners respectfully request that the Commission institute a rulemaking for the purpose of making the following modifications to Commission Rule 4 CSR 240-4.020.

Respectfully submitted,

**/s/ Lewis R. Mills, Jr.**

By: _____

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**4 CSR 240-4.020 Code of Conduct ~~During Proceedings~~**

*PURPOSE: The commission must insure that there is no question as to its impartiality in reaching a decision on the whole record developed during open hearings. This rule prohibits activities which would tend to exercise influence on the commission and which are not part of the record.*

(1) The following definitions shall apply in this rule:

(A) "*ex parte* communication" is any communication, written or oral, that concerns any matter that is pending before the Commission for decision or can reasonably be foreseen to come before the Commission for decision. Communications about purely procedural matters are not "*ex parte* communications."

(B) "Advisor" means the personal advisor of a Commissioner or any person assigned to the "Commission's advisory staff" and includes employees and contractor experts.

(~~1~~2) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

(A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

1. Evidence regarding the occurrence of transaction involved;
2. The character, credibility or criminal record of a party, witness or prospective witness
3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;
4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and
5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(~~2~~3) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner

before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(4) An attorney shall exercise reasonable care to prevent employees and officers of his client from communicating with any Commissioner, Regulatory Law Judge or Advisor as to the merits of the cause.

(35) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(46) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon ~~the commission, its staff or the presiding officer assigned to the proceeding~~ any Commissioner, Regulatory Law Judge or Advisor.

(57) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(68) No ~~member of the commission, presiding officer or employee of the commission~~ Commissioner, Regulatory Law Judge or Advisor shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.

~~(7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.~~

(89) As *ex parte* communications (either oral or written) may occur inadvertently, any ~~member of the commission, hearing examiner or employee of the commission~~ Commissioner, Regulatory Law Judge or Advisor who receives that communication shall ~~immediately~~ within 24 hours prepare a written report concerning the communication and ~~submit it to the chairman and each member of the commission~~ make it a public record by filing it in the relevant pending case(s), or if no case is pending, provide a copy to each party to the utility's most recent general rate case or earnings complaint case.. The report shall identify ~~the employee and the person(s)~~ all persons who participated in the *ex parte*

communication, all persons who witnessed the *ex parte* communication, all persons who are known to have drafted or read the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue or that can reasonably be foreseen to become an issue before the commission. If the *ex parte* report is not timely filed by the Commissioner(s), every person participating in the *ex parte* communication shall have an obligation to file an *ex parte* report.

(A) If the communication is written, the Commissioner, Regulatory Law Judge or Advisor to whom an *ex parte* communication is made shall cease reading the communication immediately upon recognizing it as an *ex parte* communication.

(B) If the communication is oral, the Commissioner, Regulatory Law Judge or Advisor to whom an *ex parte* communication is made shall ask the person making the communication to stop immediately upon recognizing it as an *ex parte* communication.

(10) No representative of a utility shall make an *ex parte* communication to an individual Commissioner or to any two Commissioners or to a quorum of the Commission. Any communication between a representative of a utility and Commissioners shall be a public record and a public meeting pursuant to Chapter 610 of the Revised Statutes of Missouri. In addition to the notice requirements of Chapter 610, RSMO or any other Commission rule, a minimum of 48 hours notice of any meeting between a representative of a utility and Commissioners shall be provided to each party to that utility's most recent general rate case or earnings complaint case.

(11) Every public meeting, as that term is defined by Chapter 610 of the Revised Statutes of Missouri, whether or not closed pursuant to Section 610.021 et seq., shall be recorded and transcribed. Such recording or transcript shall be a public record and filed in the case file or in the Commission records designated for retention of *ex parte* communications, and shall be preserved for at least six years.

(12) Pursuant to Sections 386.710.1(2) and 386.710.4, the Public Counsel shall have the authority to investigate any alleged violations of this rule, and any party to a Commission proceeding may investigate any alleged violations that may affect the proceeding.

(13) If an *ex parte* communication is made, the commission may require a party to show cause why its claim or interest in any proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(14) A commissioner, Regulatory Law Judge or Advisor that makes an *ex parte* communications or fails to disclose the *ex parte* communication shall immediately recuse from the case.

(15) A commissioner, Regulatory Law Judge or Advisor that receives an *ex parte* communications shall not entertain, or consider this communication concerning the merits of the proceeding.

*AUTHORITY: section 386.410, RSMo 1986.* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed April 26, 1976, effective Sept. 11, 1976.*

**Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.*

## VERIFICATION

STATE OF MISSOURI )
) ss
COUNTY OF COLE )

Being first duly sworn, Lewis R. Mills, Jr., Public Counsel, states as follows: that he has read the foregoing petition and the facts and allegations contained therein are true and correct to the best of his knowledge, information and belief.

Lewis R. Mills, Jr.

Subscribed and sworn to me this 18th day of December 2007.

NOTARY PUBLIC NOTARY SEAL STATE OF MISSOURI

JERENE A. BUCKMAN
My Commission Expires
August 10, 2009
Cole County
Commission #05754036

Jerene A. Buckman
Notary Public

My commission expires August 10, 2009.

## Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing petition was hand-delivered this 18th day of December 2007 upon the Office of the General Counsel.

Lewis R. Mills, Jr.

**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

| | | |
|---|---|---|
| In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Policies. | ) ) ) | Case No. AO-2008-0192 |

**INITIAL COMMENTS OF THE**
**MISSOURI ENERGY DEVELOPMENT ASSOCIATION**

COMES NOW the Missouri Energy Development Association ("MEDA"), and on behalf of itself and its members[1] submits the following initial comments:

## INTRODUCTION

On December 13, 2007, the Chairman of the Commission initiated this proceeding by issuing an order scheduling on January 7, 2008, a Roundtable Discussion to consider potential enhancement of the Commission's Standard of Conduct Rules and Conflicts of Interest policies. The order required that notice of this proceeding be provided to various entities, and that any prepared statements, comments and presentation materials be filed by January 3, 2008. On December 19, 2007, the Regulatory Law Judge assigned to this proceeding issued a second order that clarified, among other things, that materials concerning this docket may be submitted at any time before, during or after the Roundtable Discussion, and that materials filed prior to the Roundtable Discussion need not follow any particular format.

MEDA is pleased to have the opportunity to present its views on how the Commission's Standard of Conduct Rules and Conflict of Interest Policies might be improved, and plans to participate, along with its members, in the Roundtable Discussion

[1] MEDA's member companies consist of Union Electric Company, d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, Aquila, Inc., Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation, and Missouri-American Water Company.

scheduled for January 7. These initial comments are intended to provide the Commission and the other participating stakeholders with MEDA's view on three (3) over-arching principles that MEDA believes should govern any revisions to the existing standards. MEDA anticipates that it will be in a position to provide more specific comments and suggestions on behalf of its members during and after the Roundtable Discussion.

**NEED TO PRESERVE COMMISSION ACCESS TO INFORMATION**

The first principle that MEDA believes should be followed in evaluating any potential revisions in this area is the long-standing concept that a vigorous and robust exchange of ideas and information is absolutely critical to the formulation of sound public policy. In the context of this proceeding, this means that any rule changes should continue to allow for free communication among commissioners, the Commission's staff ("Staff"), the public, utilities and anyone else, *to the extent that such communication does not address a pending case*. The Missouri General Assembly has made it clear that such communications are not prohibited, but instead encouraged. Specifically, Section 386.210.1 RSMo. (Supp. 2006) provides:

> The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.

Section 386.210.2 RSMo (Supp. 2006) provides:

> Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.

Similarly, Section 386.210.4 RSMo (Supp. 2006) provides:

> Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with subsection 3 of this section.[2]

The free exchange of information contemplated by the Missouri Legislature is absolutely essential if the Commission is to properly discharge its duties. In MEDA's view, if the Commission is to fully understand and manage the complexities of utility regulation, it must have access to input from the public, to the expertise of its Staff, and to the views of customer groups and utilities that are directly affected by its policy initiatives and decisions. Similarly, it is essential that commissioners remain free to attend seminars, NARUC meetings and other, similar venues so as to enhance their understanding of the difficult and evolving issues that they must address each day, and to compare ideas with regulators from other jurisdictions. It is also important that commissioners remain free to discuss issues with other stakeholders—including utilities, public advocates, and large industrial customers—so long as those communications do not address non-procedural issues that are the subject of a pending case.

This statutory endorsement of open and free communications on matters that have been entrusted to the Commission's jurisdiction is part and parcel of a larger legislative recognition of the breadth and scope of the Commission's regulatory responsibilities and the tools the Commission's needs to carry out those expansive responsibilities in an intelligent and informed way. Those who would contend that commissioners should act and conduct themselves just like judges in a civil case misapprehend the different powers and duties of the Commission and do a disservice to both the Commission and the public

[2] Subsection 3 provides different standards for communications involving pending cases.

interest. Unlike a judge presiding over a discrete dispute involving private parties, utility commissions have sweeping and ongoing regulatory jurisdiction over the utilities they regulate, ***Borron v. Farrenkoph,*** 5 S.W.3d 618, 624 (Mo. App. W.D. 1999), including powers that are both quasi-judicial and quasi-legislative in nature. And to exercise those powers effectively and fairly, commissioners must educate themselves on a wide variety of matters affecting the utilities they regulate.

Indeed, in a recent essay, Scott Hempling, the Executive Director of the National Regulatory Research Institute – an affiliate of NARUC – wrote that to be an effective regulator, a commissioner must also be an educated regulator. To do so, the regulator must necessarily amass and digest a huge assortment of industry- and state-specific information on a wide variety of topics, including market structure, pricing, quality of service, physical adequacy of utility facilities, financial structure characteristics and corporate structure issues. Among other things, this means learning what companies are present in a particular industry, what services they sell, at what prices and under what corporate structure, their relevant performance characteristics, their infrastructure and capabilities, the financial conditions within each company and across each industry, and what agencies have jurisdiction over which players and activities.

According to Mr. Hempling, the educated regulator must also gain an understanding of the substantive and constitutional sources and parameters of his or her authority as well as an appreciation for how the actions of other regulatory agencies, whether they be agencies charged with regulating land use, tax, labor, or financial matters, intersect with utility regulation. Moreover, all of these information data points must be constantly updated to reflect rapidly changing market, industry and economic

conditions. The ability to exchange information freely on such matters is absolutely essential to meeting these informational needs of an effective, educated regulator.

Other parties may argue that there should be no communication between the commissioners and any party that might appear before the Commission regarding any issue or matter that might ultimately become the subject of some contested case in the future. MEDA recognizes that some additional requirements or clarifications respecting communications may be appropriate in certain circumstances, provided that such modifications are consistent with enabling legislation.[3] Any wholesale prohibition on discussing matters that might eventually emerge as an issue before the Commission, however, would not only conflict with existing statutes, but also place the commissioners in a cocoon and completely deprive them of the information they need to do their job. Although such an approach might be more convincingly argued for a judge in a civil case, commissioners' day-to-day roles in public utility regulation are far different, and far more dependent on information provided by their Staff, customer advocates, utilities, and members of the public. Cutting off the flow of information among these parties would significantly diminish the ability of the Commission to regulate utilities in Missouri in an informed and effective manner and should not be seriously considered.

## NEED FOR PARITY IN APPLICATION OF RULES

A second over-arching principle that MEDA believes should be followed involves the need to ensure parity in the formulation and application of any requirements governing communications between commissioners and participants in the regulatory process. In other words, should the Commission determine that it is necessary and

[3] The Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the General Assembly. ***State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission***, 225 S.W.2d 792, 793 (Mo. App. 1949).

appropriate to impose new restrictions on such communications (to ensure fairness in a pending proceeding, for example), then such restrictions must be imposed equally on all parties appearing before the Commission.

Such a result is mandated by the fact that such restrictions would normally be imposed in circumstances where fundamental due process considerations or other similar concerns require that any exchange of information only be done in a manner where all of the procedural protections and safeguards normally afforded by a contested hearing are observed. Since those procedural protections and safeguards undeniably flow to all parties in a contested case, it is clear that where utilities are prohibited from discussing issues with commissioners, Staff, the Office of the Public Counsel ("Public Counsel"), representatives of various utility customer groups, and others must likewise be subject to the same prohibitions.

**EXCLUSION FOR RULEMAKING PROCEEDINGS**

A third over-arching principle is that any restrictions that the Commission adopts should continue to recognize the distinction between contested cases and rulemaking proceedings. Due in large part to the Commission's own arguments before the courts of this state, it has been recognized that the Commission exercises quasi-legislative powers when it engages in rulemaking and that the full range of procedural protections afforded in a contested hearing context do not apply. ***State ex rel. Atmos Energy Corporation v. Public Service Commission***, 103 S.W.3d 753, 759-760 (Mo. banc 2003). Like the legislature, the Commission should therefore not be restricted from communicating with stakeholders when it properly formulates policies of general applicability during the rulemaking process.

Finally, MEDA would note that it disagrees with certain aspects of the revisions to the Commission's rules that were recently proposed by Public Counsel and others, primarily because they violate the over-arching principles described above. MEDA and its members will provide more specific comments if and when the Commission initiates a rulemaking proceeding to consider those proposed revisions.

Respectfully submitted,

Missouri Energy Development Association

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 3rd day of January, 2008, to the following:

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/s/ Paul A. Boudreau
Paul A. Boudreau

**BEFORE THE PUBLIC SERVCE COMMISSION**
**OF THE STATE OF MISSOURI**

| | | |
|---|---|---|
| In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules And Conflicts of Interest Policies. | ) ) ) | Case No. AO-2008-0192 |

## Initial Comments of Julie Noonan

COMES NOW Julie Noonan and submits the following initial comments:

I remain an interested party and appreciate the opportunity to submit documentation for the Commission's consideration and participate in the Roundtable Discussion. I also appreciate the additional preparation time afforded to interested parties through the Notice of Clarification in this case filed on December 19, 2007. While I continue to work to complete documentation, I respect the Moderator and Commission's desire to assess what time may be required and topics may be presented to the Commission during the Roundtable on January 7, 2008.

Please note that I intend to submit and present at the January 7, 2008 Roundtable:

- 15-18 specific Recommendations for Informal Commission Action
    - In general, the Recommendations for Informal Commission Action reference and support adherence to existing Missouri State Statutes,

Rules, and Code of Conduct. Suggestions will be provided that can be implemented through Informal Action of the Chairman and/or the Commissioners of the PSC. The 15-18 recommendations provide suggestions that are expected to result in increased public confidence in the Commission.

- 3 Recommendations for Formal Commission Action (i.e. Rulemaking)
    - In general, the Recommendations for Formal Commission Action pertain to:
        - PSC handling of Complaints
        - Creation of an Applicant funded mechanism with the purpose of defraying costs associated with proceedings for municipalities (provided the municipality is not the Applicant), Counties, and other local parties
        - Concurrence with Office of Public Counsel recommendations regarding modifications to ex parte rules
- 3 Recommendations for Statutory Change
        - Request that the Commission not sponsor or support any change in Missouri State Statutes that would result in legalizing that which is illegal today
        - Review and Revision of State Statutes to support increased documentation of PSC responsibilities. Where there are laws and rules pertaining to regulated entities, develop corresponding

verbiage that supports proactive regulation of these monopolies to benefit the citizens of the State of Missouri.

- Increase membership of Commission and develop case assignment (no fewer than 3 Commissioners per case), if load requires, and require actual attendance during 90% or more of the meetings, hearings, and discussions related to a case in order to be qualified to vote in the matter.

Although I've worked diligently in my personal time to prepare suggestions for Commission consideration, I will submit initial detailed documentation by January 7th and will provide additional, more complete documentation on or before January 31st, the date the Notice of Clarification suggests is the earliest possible date that the case will be closed.

Respectfully Submitted,

Julie L. Noonan

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# Recommendations for Actions The Missouri Public Service Commission Can Implement Informally; Actions Requiring Formal Commission Action, i.e. Rulemaking; and Recommended Statutory Changes

**Submitted by: Julie L. Noonan**

## *Recommendations for Actions the Commission can Implement Informally*

### Section Summary

The following pages contain specific recommendations for Action that the Commission can and should implement informally. The recommendations are numbered and may contain: 1) The Informal Action Recommendation, 2) Statements in Support, and 3) References to Laws, Rules, Exhibits, Orders, Opinions, Dissenting Opinions, etc. supporting the recommendation.

Due to the short time frame allotted for preparation of the recommendations prior to the Workshop and Roundtable scheduled for AO-2008-0192, the following is provided as a draft recommendation. A complete recommendation will be provided following the roundtable session in order to incorporate feedback from all parties.

The following recommendations are provided as proposed (additional) content for a (the) PSC Standards of Conduct (SOC) that the Commission should formally adopt to provide guidance for the conduct of Commission business. The recommendations are considered informal in that the Commission may self-impose such Standards of Conduct without the need for legislative or rulemaking activity. The recommendations include:

**SOC Recommendation #1**: **Adopt PSC Standards of Conduct**

- The Commission establishes and formally adopts Public Service Commission Standards of Conduct (SOC) to provide specific guidance for the conduct of the Commission as it supports Commission business.

**Statements in support**

1. CSR Title 4-DEPARfMENT OF ECONOMIC DEVELOPMENT Division 240-Public Service Commission Chapter 4-Standards of Conduct, Executive Order and Code of Conduct contained therein coupled with other Laws and Rules seek to outline and mandate the appropriate comportment of the PSC and also of those with business before the PSC.
2. While this is necessary and helpful, guidance for conduct and expectations of the Commission is interspersed with conduct and expectations of others and appears prescriptive rather than self-imposed.
3. Further, as a citizen who has been significantly impacted by the actions of a regulated utility and the PSC, it would increase my confidence in the commitment of the Commission to fulfill the letter, spirit, and intent of the law if the Commission created and adopted SOCs that speak only to the conduct and expectations of the PSC and that include a greater level of specificity by adopting conduct statements (SOCs) that pertain to PSC obligations outlined and/or inferred or mandated by court orders outside of the CSR Title 4 Standards of Conduct.

**SOC Recommendation #2**: **Implement PSC Standards of Conduct Affidavit**

- All Commission orders include an affidavit from the Regulatory Law Judge acting as the Hearing Officer that all PSC SOC's were observed and upheld leading up to the issuance of the Commission Order at hand.

**Statements in Support:**

1. Self-imposed requirement of the PSC Standards of Conduct Affidavit would provide positive and documented assurance to citizens served by the Commission and all who have matters before the PSC that the Regulatory Law Judge acting as Hearing Officer carefully monitors and ensures compliance with the PSC Standards of Conduct.
2. While the current statutes and rules may imply such accountability, and in some cases even prescribe such accountability, the PSC Standards of Conduct Affidavit and the practice of tying the Affidavit to specific actions and orders of the Commission provides affirmative assurance that all SOCs were, indeed, honored by the Commission in the particular matter at hand.

The following are PSC SOCs are recommendations that should be included within the proposed self-imposed PSC SOC referenced in SOC Recommendation #1 above.

**SOC Recommendation #3: Affirmation of PSC Constitutional Public Protection**

- The PSC respects citizens' rights and refuses to condone, reward, or act in collusion with regulated entities who subvert citizen rights granted in United States Amendment XIV and the Missouri Constitution, Article I Bill of Rights.

**Statements in Support:**

The PSC, through inattention to such SOC's has shifted the burden of proof and protection onto the citizenry.

1. Had the Missouri Public Service Commission simply done its job and honored both the letter and the intent of the existing Laws, Rules, and many of the policies in place, StopAquila.org members and other individuals and governments, and I would not have had to spend the last 3 full years and the next who knows how many years agonizing and arguing in multiple PSC and Court cases to have our Constitutional rights and laws of the State upheld.

2. If members of StopAquila.org were able to trust that the PSC were actually upholding both the letter and the intent of the Missouri Constitution, Statutes, Rules of the Department of Economic Development, Code of Ethics, and established procedures, we would not have to scour the internet and papers to see what unscrupulous moves, posturing, or surprise cases were headed our way. Nor would we feel compelled to take aggressive measures to ensure representation and awareness of local and state legislative agendas to thwart attempts at changing the laws to approve of or provide an exception for an illegally built power plant.

Aquila ratepayers and Missouri Citizens were generally and specifically harmed by the improper adjudication associated with the Aquila South Harper Power Facility, despite numerous improper and/or illegal siting, permitting, business and development practices on the part of Aquila.

1. Aquila was desperate to transfer 3 old technology turbines purchased on the unregulated side of their business to the regulated side of the business where they could (and did) request that rate payers help subsidize their past poor management decisions, and take advantage of tax shelter and debt service rates not otherwise available to them. Aquila deprived citizens of property without due process of law through refusal to request Rezoning or a Special Use Permit from Cass County, the local government with jurisdiction of zoning, master planning, and associated permitting and authorization authority. They selected a site, built, and turned up the power plant despite an injunction in record time all in haste to include project costs in the Summer 2005 rate case.

2. The assessed value of my home decreased approximately 20% in 2007. My understanding is that the decreased valuation is a direct result of the proximity of my home (within ½ mile) to the South Harper Peaking Facility. All other homeowners living in close proximity to SHPF also saw significant decline in the assessed value of their property as a direct result of the illegally built power plant. I present these real and significant statements in good faith after a conversation with Curtis Koons, the Cass County Assessor at the time my property assessment for 2007 was conducted. I have requested and will pursue specific confirmation and other evidence that supports this fact.

**SOC Recommendation #4: Affirmation of PSC Legal Compliance Intent**

- PSC honors "the letter of the law and seeks to fulfill the spirit and the intent of the law", as suggested in 4 CSR 240 Executive Order 92-04. PSC also "shall conduct the business of state government in a manner which inspires public confidence and trust" as suggested in the Code of Conduct.

**Statements in Support:**

3. Jon Empson, Aquila VP, declared at the Lyons Club in Peculiar during the public forum hosted by Aquila in 2004 that the PSC preferred that Aquila build the SHPF plant in this location. If his statement was true, then it appears to this citizen that there was inappropriate discussion and commitment and/or encouragement from the PSC. Mr. Empson's statement was made at least two months prior to any case being opened before the PSC in regard to South Harper (similar to Rick Green's communication with the Aquila board regarding pre-determination on merger). If it is true, as Jon Empson declared, that the PSC stated a preference that Aquila build SHPF in the area it currently occupies, then the PSC acted to encourage, support, or commit to something the PSC was telling the public, including me personally, that they had no involvement in. It certainly

doesn't inspire my trust if the government tells me they have no involvement in a matter if, in fact, the government is involved in the matter.

4. My first inclination after hearing of the planned power plant and attending the meeting Aquila hosted at the Lyon's Club in 2004 was to engage the PSC by filing a complaint, asking for assistance in impacting the matter, and learning about the PSC's position on the proposed plant. Upon receiving my complaint via the PSC web site and discussing concerns with Warren Wood (PSC Staff), was encouraged to dissuade others from filing similar complaints and was told that any such additional complaints would be routed to me. After initial conversation with Warren Wood covering multiple topics, he and PSC attorney(s) called regarding Empson's statement that the PSC preferred Aquila build South Harper to say that the PSC doesn't have anything to do with power plants until after they are built.
5. Not only did PSC staff fail to address my concerns, answer my questions about process, or represent the office in a manner that lead me to believe they were bound to support public interest, it seemed that the PSC wanted to shove their responsibilities off onto me. The statement of Jon Empson and the visit to the South Harper site of Commissioner Appling after injunction and the day prior to commencement of major concrete pouring give the appearance that the PSC was indeed involved in activities that they told the public they were not engaged in.
6. Within a few days of the Circuit Court issuance of the permanent injunction against construction of South Harper, Commissioner Appling met with Aquila employees and toured the site for SHPF. Commissioner Appling visited SHPF on January 14, 2005 and major concrete pouring commenced on January 15, and installation of the three CTs began on March 10, 2005.
7. While the current ex parte rules specify adherence to the rule to during PSC hearings, The Office of Public Counsel, others, and I propose that the *intent* of the law and rules is to provide fair, impartial decision making. I have greater confidence in the PSCs fair and impartial decision making if I am not left wondering what conversations, direction, or intention is expressed outside of formal business properly considered within formal proceedings and available to all parties.

**SOC Recommendation #5: Affirmation of PSC Enforcement Pertaining to Site Specific Certificates of Need and Necessity**

- The PSC affirms and demonstrates that the Commission respects the Missouri Constitution, the Revised Missouri State Statutes, and the direction within the final WD64985 Opinion of the Missouri Court of Appeals that specifies that a utility must secure a Site Specific Certificate of Need and Necessity prior to disturbing the first spadeful of soil when planning to build or expand power generation facilities. The PSC requires that utilities seeking a Site Specific CNN comply with all applicable local laws, and no Site Specific CNN will be awarded unless the utility provides undisputed (by local governments where such facilities are proposed to be located/expanded) proof of compliance with applicable local laws, ordinances, permitting, zoning, etc.

**Statements in Support:**

1. The first question I asked at the public forum hosted by Aquila in 2004 was my attempt to ascertain whether Aquila possessed or in the alternative, when they planned to obtain a Site Specific Certificate of Need and Necessity for SHPF. The law indicated that a Site Specific CNN would be required for SHPF, yet Aquila asserted that it did not. The expenditure of thousands of hours, hundreds of thousands of dollars, and multiple cases would have been avoided had all utilities known that the PSC would enforce compliance with the State Statute that requires utilities to secure a SS CNN PRIOR to building, operating, owning, etc. a power plant.
2. My early discussions with PSC Staff member Warren Wood also included my holding that Aquila could not build without a Site Specific CNN and his assertion that the PSC does not require SS CNNs or have any other involvement in the siting, building, and operation of a new power plant, rather only determines whether related expenses were prudently incurred and whether the utility may recoup such expenses through rates. The law requires and the Western District Appeals Court has confirmed that a Site Specific CNN is required by despite the lack of Commission compliance in recent years. Inclusion of the Affirmation suggested as SOC#5 removes confusion regarding Commission stance and enforcement in this area.
3. Among other concerns with Aquila behavior, early on I confirmed that the zoning of the parcel where Aquila intended to build SHPF would not allow the construction or operation of the proposed facility. I looked forward to the support of my Constitutional rights of due process through the County that is invested with the police powers to create, maintain, and enforce zoning and master planning in unincorporated Cass County where SHPF was built and I reside. Unfortunately, Aquila refused to submit to the appropriate process to request zoning change or Special Use Permit from Cass County. Before the PSC and the courts, Aquila acted as if to do so was a ridiculous and unnecessary act, yet they had done exactly that prior to building Aries, began to do so for the proposed Camp Branch power plant, committed to do so in their agreement with the City of Peculiar, and said they would do so at various times during the SHPF debacle. The law also requires and the Western District Appeals Court has confirmed that in this particular instance, Aquila was not exempt from Cass County zoning and permitting. The PSC should never again act as if they are not obliged to require utility compliance to request and obtain local authority, when applicable (acknowledging some areas may not have zoning or other land use requirements).
4. If SHPF is ultimately deconstructed as specifically ordered in the permanent injunction issued prior to the time that Aquila began building, it will certainly be a waste. That waste could have and would have been avoided had the PSC required that Aquila seek and obtain a Site Specific CNN PRIOR to building and had the PSC required that such certificate, if granted, be conditioned as suggested in SOC Recommendation #5. It is my hope that no other citizen or local government ever again be subjected to what we've had to endure and fight regarding SHPF. Never

should a utility in the State of Missouri be able to decide to do first and ask forgiveness later.

**SOC Recommendation #6**: **Affirmation of Full, Fair, and Impartial Hearings**

- With the assistance of the Regulatory Law Judge acting as Hearing Officer, the PSC Chairman ensures that all hearings are full, fair, and impartial.

**Statements in Support:**

1. In EA-2005-0248 in which Aquila requested confirmation that existing Certificates were sufficient to build SHPF or in the alternative, for a Site Specific CNN, Commissioner Davis halted proceedings abruptly in the middle of Cass County cross and prior to allowing StopAquila.org and other interveners to question. All opposed were not allowed to put on any witnesses. I believe that the proceeding was not full, fair, or impartial.
2. Associated with EA-2005-0248, the Commissioner Davis made a statement to the effect that impacted parties should properly be heard in a subsequent rate case. The interpretation was that our concerns and interests were not proper for consideration of the Commission with regard to whether Aquila could or should build, but only after they had done so to argue that Aquila should be burdened with financial repercussions. It is wholly and completely inappropriate to exclude Intervener concerns and information from proceedings regarding CNNs. I would much rather that my rights and the rights of other citizens similarly impacted in this or in future cases be afforded the consideration of inclusion and due process. A slap on the offending utility's wrist after the fact is simply insufficient.
3. In EA-2006-0309, Commissioner Murray was questioning PSC Staff member Warren Wood and asked if Aquila had to dismantle the all ready built SHPF and Aquila ran out of power, that Cass County should be the first to forgo having power. I was shocked and appalled at the suggestion that implied that because Cass County was properly asserting their responsibility to uphold the laws and protect Cass County citizens, that they should be punished if a power shortage should occur. This was only one of multiple instances that it appeared a Commissioner or PSC Staff was advocating on behalf of Aquila and displaying partiality.

**SOC Recommendation #7: Affirmation of Applicant Burden of Proof**

- The PSC ensures that the burden of proof for Need & Necessity and other requested orders from the PSC is upon the Applicant and NOT on interveners.

**Statement in Support:**

1. In AO-2006-0309, the majority of the PSC improperly shifted the burden of proof to Interveners as discussed in the Dissenting Opinion of Commissioners Robert M. Clayton III and Steve Gaw. Commissioner Appling's Concurring Opinion also confirms that the burden was shifted from Aquila to others by stating that "…

there is no compelling reason to deny the company's request for a certificate of convenience and necessity".

2. Although the Regulatory Law Judge stated up front that the burden of proof would be upon Aquila, it seemed that during the entire proceeding, the Commission majority and staff sided with Aquila and asked interveners to disprove Need & Necessity and/or Aquila's site selection without even confirming what process the Commission would ultimately use.

**SOC Recommendation #8: Affirmation of PSC and/or Independent Evaluation of Applicant Claims**

- The PSC ensures that staff and/or others independently examine all Applicant claims relative to least cost options and insist upon adherence to least cost options unless there is a competing objective of decreased dependence on generation utilizing fossil fuels.

**Statements in Support:**

**<information to be provided in final submission>**

**SOC Recommendation #9: Affirmation of PSC Public Protection in matters of Long Term Planning and Ratemaking**

- The PSC must ensure that utilities make continual progress toward implementing long term planning to reduce customer exposure to fossil fuel volatility and that reflects appropriate mix between types of power generation.

**<information to be provided in final submission>**

**SOC Recommendation #10: Affirmation of PSC Commitment to Approve Rate Inclusion Limited to Actual Facilities and Generation that are Used and Useful**

- The PSC only considers and contemplates approval of reasonable expenses for actual facilities that are both used and useful.

**Statements in Support:**

1. In ER-2005-0436, the PSC considered expenses incurred by Aquila related to SHPF. At the time of the decision, the facility had 3 turbines, was not operating, and had a permanent injunction against its construction and operation.
2. In the same case, the PSC also considered expenses for non-existent generation. Aquila had 3 turbines at South Harper, which was the actual plant referenced as "hypothetical" but the rate case considered 5 turbines.

**Reference:**

The following is an excerpt from Commissioner Steve Gaw's Dissenting Opinion in ER-2005-0436.

**Non-used and Non-existent Generation Units**

This agreement places in rate base a gas-fired combustion turbine generating facility with around 500 MW of capacity. Approximately 300 MWs are based upon what Staff deems to be prudently incurred costs of the South Harper facility .

An additional 200 MWs more or less represent what Staff believes would be the prudently incurred cost of adding an additional two combustion turbines to that same location .

Case No. ER-2005-0436

TariffNo. YE-2005-1045

Section 393 .135 RSMo 2005 states:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

This section was established by initiative petition in 1976. Also known as Proposition One, it was adopted at a time when many in the state were upset with increasing utility rates caused in part by construction costs of new plants being passed on to consumers prior to the plants being used and useful and without the scrutiny of the prudence of those costs that after the fact reviews bring.

In this case the South Harper facility does not appear to meet the requirements of §393 .135. After months of litigation as to its siting and operation, the Cass County Circuit Court has ordered the plant shut down and has slated it for deconstruction. While it is possible that authority could be received from either Cass County or the Missouri Public Service Commission that would change the outcome of the future operation of this facility, it is clear that at the time of this decision the facility is not and cannot be used for service as required by law. Yet the parties to the Stipulation have attempted to create a new mechanism for accomplishing exactly the same result in rates and rate base as would occur if the facility were fully operational Furthermore, the Stipulation adds two more units that do not exist and places them in rate base as well.

Therefore, this Order provides for the inclusion of some facilities that are not used and useful and it includes others that do not exist at all.

This Order sets a precedent which in effect erases §393.135. As stated, the legal logic used places a phantom plant in Aquila's rate base to account for the South Harper facility which cannot be in rate base and includes additional fictional generation as well to replace an expiring contract for generation at the Calpine-owned Aires plant. Why can't this same logic be used in any case before the Commission to place any surrogate plant in rate base that may be contemplated or under construction even though the actual facilities could not be in rate base under law? Some might argue that in light of Aquila's situation with the South Harper facility it is understandable that the parties would attempt to be inventive in assisting Aquila out of its selfmade predicament. But, this Commission cannot ignore the law nor should it set such a precedent.

**<u>SOC Recommendation #11</u>: Affirmation of PSC Regulation of Regulated Utility Asset Disposal**

- The PSC ensures that no utility is granted an order authorizing it to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do."

**Statements in Support:**

1. In EO-2005-0156, Aquila asked to transfer and leaseback assets AFTER Aquila had all ready completed the transaction.
2. It appears to this citizen that the law requires request and authorization PRIOR to such action. Furthermore, the law indicates that transactions that do not comply with the law specifies that unlawful transactions are void.
3. As in other areas of concern, the majority rewarded Aquila for illegal and inappropriate behavior.
4. In addition to the fact that Aquila entered the agreement prior to requesting and receiving Commission approval, Aquila testified as if the transaction had not yet transpired.
5. Again, it is totally unacceptable to act first and ask forgiveness later. These acts subvert the law and regulation by the PSC. The PSC should not continue to reward such behavior.

**Reference:**

Excerpt from EO-2005-0156 Dissent of Commissioners Robert M. Clayton III and Steve Gaw:

> It is clear from the foregoing discussion that the CTs used in the South Harper Generation Facility were considered necessary by Aquila in the performance ofAquila's duties to the public. The necessary nature of these assets is admitted by Aquila in its Application as well as in its pending rate proceeding. As such, Section 393.190 specifically prohibits any sale, assignment, lease, transfer, mortgage or other encumbrance without the prior approval of the Commission. The record indicates that Aquila executed, in December of 2004, a Bill of Sale providing for the transfer of all of Aquila's rights, title, and interest in the South Harper CTs . Recognizing that Aquila had not yet obtained the approval of the Commission, this transaction is necessarily void. No amount of accounting or legal gymnastics can correct this legal deficiency.
>
> Finally, these Commissioners wish to note that nothing in this Order makes reference to the questionable handling of information relating to this case by Aquila. It is apparent that the Company has been less than forthright with the

Commission . Specifically, we note: (1) Aquila never voluntarily disclosed to the Commission that the December 2004 transfer occurred ; (2) Aquila's failure to provide executed copies of the relevant documents; (3) Aquila's use of the future tense in its pleadings and testimony in describing a transaction that had already occurred; (4) Aquila's claims that the Commission should have been aware of the executed transaction based upon public statements by the Mayor of Peculiar in a different proceeding, despite Aquila's principal witness denying he was aware of the December 2004 transaction at the time of the September 21, 2005 hearing; and (5) Aquila's failure to address Commissioner inquiries at the hearing or to correct the Commission and the parties' belief that the transaction had not yet occurred. Explanations by counsel and Aquila's witness were not satisfactory and proved elusive, vague and questionable. Nowhere in the majority's Order is Aquila admonished for its representations or omissions . As such, it appears that such lack of candor is acceptable practice before this tribunal. Such representations and omissions deserve further inquiry from the Commission for possible future action."

**SOC Recommendation #12: Affirmation of PSC Freedom from Outside Influence**

- The PSC avoids any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of official duties. In addition to the familial relationships specified within the law, any Commissioner or Regulatory Law Judge who has a personal relationship with a representative or member of an Applicant recuses themselves from all cases that involve that Applicant in order to ensure fair and impartial decision making by the Commission.

**Statements in Support:**

**<information to be provided in final submission>**

**SOC Recommendation #13: Affirmation of PSC Compliance with Limitation of Powers**

- The PSC refrains from extending powers beyond that which are specifically bestowed on the Commission by Missouri State Statutes.

**Statements in Support:**

**<information to be provided in final submission>**

**SOC Recommendation #14: Affirmation of PSC Reliance on Established Processes**

- The PSC relies solely on processes outlined in the law, PSC Rules, and those which are agreed to and understood by all parties in a matter.

**Statements in Support:**

1. In EA-2006-0309, PSC staff created a new process to be used in determining whether a CNN should be granted for the all ready built SHPF. The process was introduced, but not confirmed as the process that would be used by the Commissioners to make the determination until issuance of the Report & Order.

2. The process, created by PSC Staff member Warren Wood, relegated zoning and/or permitting to a status that was a discardable factor. Clearly, multiple interveners were at a huge disadvantage in preparing for and participating in a case where the PSC failed to outline the process for decision making in the matter prior to the time that the Report & Order was issued.
3. The process referenced was also recommended as a process to be followed only for the SHPF and not used for any future CNN cases. Public trust is not enhanced by failing to inform all parties of the criteria for decision making or by making up the rules as you go.

## *Recommended Actions Requiring Formal Commission Action (i.e. Rulemaking)*

**Formal Commission Action Recommendation #1: PSC Complaint Support**

Create and enforce a rule directing PSC Staff to:

a) Ensure that PSC rules for filing both Informal and Formal Complaints are posted on the PSC web site in conjunction with the complaint form that currently is located at: http://psc.missouri.gov/ComplaintForm.asp.
b) Ensure that the form referenced in a) above does not provide an impression that acceptable complaints are limited to billing or personal utility consumption issues.
c) In addition, the rule directs PSC Staff to offer the same information about rules for filing both Informal and Formal Complaints to anyone who calls or visits the PSC intending to make a complaint.
d) The web site and PSC Staff clearly inform individuals desiring to file an informal complaint that if they are not satisfied with the response, they may file a formal complaint to seek satisfactory resolution.
e) Within the same or in a separate rule, the Commission directs PSC Staff to provide full disclosure, information, and assistance to citizens and other governmental agencies that seek information relevant to the processes, rules, and business and of the PSC.

**Statements in Support:**

1. The PSC web site is an important and helpful asset of the PSC, however, citizens and other entities might conclude from the current Complaint Form that complaints are limited to matters pertaining only to individual impacts related to billing or service suspension practices of utilities.
2. Creation of the PSC Complaint Support rule helps insure that those who desire to make a complaint feel welcome to make any complaint that they reasonably believe to within the authority of the PSC to receive and consider.
3. The recommended rule also ensures that, regardless of whether one contemplates or attempts to file a complaint online or through conversation with PSC Staff, all parties understand that they may also file a formal complaint if they are not satisfied with the PSC Staff response.
4. Commission direction to staff as outlined in e) above acknowledges that the processes, rules, and business of the PSC are complex and difficult, if not impossible to understand and interact with for parties not customarily involved in PSC business. Since the PSC exists to serve the citizens, this provision ensures that PSC staff understands, respects, and supports an obligation to assist other governmental agencies and citizens upon request.

**Formal Commission Action Recommendation #2: Establishment of Intervener Fund**
Create and enforce a rule modeled off of a concept contained within New York State Law that establishes an account funded by the Applicant for the purpose of defraying the cost of representation for local interveners (governmental bodies that are not the applicant and other local parties).

**Statements in Support:**

**1.** While the business of the PSC is conducted in what is described as a "quasi-judicial" setting, the financial implications to those impacted by Applicant requests for Certificates, Ratemaking, and other Orders of the PSC are significant.

**2.** The cost of participation is such that many who are impacted by actions and requests of entities regulated by the PSC may not be able to participate. Those that do proceed with participation may be significantly limited in their ability to engage experts and have legal counsel representation in all pertinent matters and proceedings.

**3.** I understand and appreciate that the Office of Public Counsel is available to support public interest in proceedings before the PSC, however, OPC engagement and support is geared toward the broadest public interest and not to entities or individuals most specifically and locally impacted.

4. Although some neighbors of SHPF have made payments to StopAquila.org attorney, Gerry Eftink, over the past 3 years and Aquila made one payment, I receive a monthly bill that is currently over $35,000. In the coming months, that bill will likely increase.

**Reference**

The following is an excerpt from New York State, PBS, Article 8, section 142. This outlines the practice of establishing and administering a fund for interveners. Submission of a specified amount to the fund is required with application for a certificate to build a power plant.

"6. (a) Each application shall be accompanied by a fee of one hundred fifty thousand dollars to be used to establish a fund (hereafter in this section referred to as the "fund") to be disbursed at the board's direction, to defray expenses incurred by municipal and other local parties to the proceeding (except a municipality which is the applicant) for expert witness and consultant fees. The board shall provide transcripts, reproduce and serve documents, and publish required notices, for municipal parties. Any monies remaining in the fund, after the board has issued its decision on an application under this article and the time for applying for a rehearing and judicial review has expired, shall be returned to the applicant.

(b) The one hundred fifty thousand dollar fee required by paragraph (a) of this subdivision shall be deposited in one or more separate accounts in one or more banks of the board's choosing insured by the federal deposit insurance corporation. Notwithstanding any other provision of law to the contrary, the board shall provide by rules and regulations for the management of the fund, for disbursements from the fund, and for the proper auditing of monies in the fund, which rules and

> regulations shall be consistent with the purpose of this section to make available to municipal parties up to seventy-five thousand dollars from such fund for uses specified in this section. In addition, the board shall provide other local parties up to seventy-five thousand dollars, provided however, that the board shall assure that such funds are made available on an equitable basis in a manner which facilitates broad public participation.

My recommendation is that a similar fund be established in Missouri for cases where Applicant requests a Certificate, Rate Change, Merger, or other impacting Order of the Commission. I also recommend that the Missouri law specify that the funds may be used for legal representation, expert witness, and consultant fees and that the total per application be a specified amount that is likely to be sufficient to significantly defray the majority of costs likely to be incurred by interveners.

## *Recommended Statutory Changes*

**Recommended Statutory Change #1: PSC Refrains from Sponsoring or Supporting changes that Legalize that which is Illegal**

**Statements in Support:**

1. My primary concern and recommendation related to initiating Statutory Changes is that the PSC does not engage in sponsoring or supporting any change in Missouri State Statutes that would result in attempting to legalize that which is illegal today. In making this recommendation, I intend that this recommendation also include refraining from sponsoring or supporting any changes to laws referenced throughout the Informal Recommendations provided within this document. I understand that Commissioner Davis and I may still have differences in our interpretation of what is and is not legal today.
2. During my 3 year ordeal (and counting), I have witnessed and have been drastically impacted by a utility seeking to engage multiple government entities in collusion to enable and approve their irresponsible and illegal behavior. While it is certainly true that the Missouri State Statutes and Rules of the PSC are not as prescriptive as the laws in some states, I am reluctant to trust that new laws are necessarily the answer.
3. I am aware of attempts to attach amendments to proposed law within the past 3 years that would result in an either an exemption for or authorization of Aquila's illegally built SHPF.
4. I am also cognizant that the legislature relies heavily on input from the PSC when considering matters pertaining to the business of and laws impacting regulated entities.
5. I fear that even if new laws are enacted that I support in concept, regulated entities and perhaps the PSC may use it as an opportunity to act in ways that run counter to intention of the law given the fact that new laws have no associated court orders providing clarification and helping to establish the boundaries of comport under the law.

**Recommended Statutory Change #2: Commission Membership and Attendance**

Expand the number of Commissioners of the PSC so that committees of Commissioners are assigned to cases before the PSC. In addition to increasing the number of PSC Commissioners, the law or associated rules should include additional provisions which ensure that:

a) A prescribed number of Commissioners (not less than 3) are in physical attendance or are attending via video conference all hearings and meetings related to a case,

b)That the presiding Regulatory Law Judge will call for questions of Commissioners attending via video conference just as if the Commissioner were physically present in the room, and

c)That Commissioners must be in attendance (as indicated in "a") a minimum of XX% of the time expended for all sessions (Pre-hearing Conference, Public Hearings, Hearings, etc) related to a case in order to be eligible to vote upon that case,

d) The presiding Regulatory Law Judge or Court Reporter will make record of all time each Commissioner is in attendance during each part and for the entirety of the case. Records will be reviewed prior to voting on the matter and the Regulatory Law Judge will announce eligibility of each Commissioner to vote on the case.

**Statements in Support:**

1. Recommendation # 2 is presented due to a perception that the load of cases before the PSC may be such that Commissioners are unable to commit to full engagement in proceedings and that an informal approach has been implemented to "divide and conquer" the numerous cases.
2. Quite honestly, it was very disturbing that multiple Commissioners appeared to be absent most of the time hearings were underway (of various types I've attended) during the last 3 years. Even if they were "observing" at their computer terminals, that is not the same as participating in the process and encourages "multi-tasking", inattention, and reduced accountability for full, fair, and impartial review.
3. While I am required to take vacation to prepare, attend, and support my rights, it appears to me personally that the Commission places no or insufficient requirement on Commissioner attendance/participation in proceedings.
4. Over the course of the past 3 years and multiple hearings related to SFPF and Aquila Rate cases, many people assumed that the lack of attendance by some Commissioners coupled with consistent pro-Aquila questioning of Interveners and Applicant during what little time they did participate signaled partiality toward private rather than public interests, and decision making based on incomplete/insufficient information.
5. Expansion of the PSC and corresponding implementation of practices outlined in a) through d) above would significantly improve my faith in the Commissions ability to fulfill the obligation they have to fully support the workload of the Commission, allow full and meaningful participation, and afford all parties full and impartial decision making.

**Placeholder for Appendix**
The following documents are appended providing context and additional details referenced in Court Orders, Report & Orders, Dissenting, Concurring Opinions, Testimony, and Exhibits of several relevant cases and other pertinent documentation. References to additional documentation submitted in the current Workshop and Roundtable docket include Exhibit Number and Title only.

PSC Case EO-2005-0156 – Transfer of Turbines, etc.

PSC Case EA-2005-0248 – Clarifying Order

PSC Case ER-2005-0436 – Rate Case

PSC Case EA-2006-0309 – Site Specific Certificate

CV104-1380cc – Original StopAquila law suit vs. Aquila

CV104-1443cc – Original Cass County vs. Aquila

WD64985 – Cass County vs. Aquila

06-CA-CV-01698 – Cass County vs. Missouri Public Service Commission

WD67739 – Cass County vs. Missouri Public Service Commission

PSC Case ER-2007-0004

PSC Case OA-2008-0192

**BEFORE THE PUBLIC SERVICE COMMISSION**
**STATE OF MISSOURI**

| | | |
|---|---|---|
| In the Matter of the In the Matter of the | ) | **Case No. AX-2008-0201** |
| Proposed Revision to 4 CSR 240-4.020. | ) | **Case No. AO-2008-0192** |

# STAFF'S RESPONSE TO THE PROPOSED RULEMAKING

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and for its Response to the Motion for Proposed Rulemaking filed herein by the Office of the Public Counsel and several others,[1] states as follows:

***Introduction***

1. On December 19, 2007, the Public Counsel, together with other interested parties, filed a Motion for Proposed Rulemaking seeking to initiate a rulemaking to amend Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings.* Attached to the Motion is a list of specific amendments sought by the Movants, which are set out in the Appendix to this Response.

2. Staff states that it views the proposed amendments to Rule 4 CSR 240-4.020 to be frankly unworkable, inappropriate and unlawful. If adopted, the Commission members would be significantly impaired in carrying out many of their statutory duties. As Staff has elsewhere pointed out, the PSC

[1] Joining Public Counsel are the Midwest Gas Users Association, the Sedalia Industrial Energy Users Association, the Missouri Industrial Energy Consumers, the Missouri Energy Group, AG Processing, Inc., Praxair, Inc., AARP, and the Consumers Council of Missouri. The several members of the first four associations are enumerated on the first page of Public Counsel's Motion for Rulemaking.

Commissioners are administrative officers of the Executive Branch; they are not judicial officers.[2] Unlike judicial officers, who are expected to know nothing of the controversies brought to them, the PSC Commissioners are expected to be knowledgeable, if not expert, in the area of the utility industry. Unlike judges, the PSC Commissioners have administrative, regulatory and enforcement duties, as well as policy-making and quasi-legislative duties. These points are not controversial or unusual but are a commonplace of administrative law. *See* A.S. Neeley, *Administrative Practice & Procedure,* 20 Missouri Practice § 1.04 (3rd ed., 2001). Yet the Movants propose rule amendments that would needlessly and unlawfully hamper the Commissioners in fulfilling the full range of their statutory responsibilities. Moreover, in essence, the Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners.

3. Staff further states that, to the extent that any significant change to the existing structure of statutes and rules is deemed absolutely necessary, Staff suggests that some consideration should be given to a change similar to that enacted by the Legislature when similar concerns arose concerning the impartiality of the various boards that regulate the licensed professions. To address that concern, the Legislature removed the adjudicative function from the boards and bestowed it upon a neutral central panel, the Administrative Hearing Commission. In like manner, the Movants' concerns could be better addressed by transferring a measure of the Commission's adjudicative authority to the Commission's cadre of Regulatory Law Judges (RLJs), leaving the

[2] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Staff's Response to Public Counsel's Motion to Dismiss,* filed on December 27, 2007), p. 7 ff.

Commissioners better able to exercise their policy-making, regulatory and enforcement, and quasi-legislative functions. To allay Movants' concerns, the RLJs – having no function other than the adjudicative – could be made subject to rules similar to the Canons of Judicial Conduct. Staff believes that, while such a restructuring possibly could be accomplished within the present statutory framework, under the authority of § 386.240, RSMo 2000, clearly for such a change after nearly 100 years of the Commission's existence it would be better to seek the blessing and imprimatur of the Legislature, and it is only one of a number of proposals that might be considered.

4. Staff's suggestion at ¶ 3, *supra*, should not be read to indicate that Staff believes that any such significant restructuring is necessary. Rather, Staff believes that a prudent and thoughtful compliance with existing statutes and rules both protects the rights of the parties and protects the Commission from unfair public criticism. Staff is not saying that the Commission should do nothing. For example, the Commission should consider amending its existing rules to provide more transparency in the Commissioners' day-to-day activity out of the hearing room and the Agenda. Staff is merely suggesting that the Commission and others should not overreact. Failing to overreact just a few years ago to the unlimited promises of retail competition has saved the State from the unlimited detriments now being experienced by those States that did so.

***Is the Proposed Rulemaking Necessary?***

5. Section 536.041, RSMo 2000, provides that "[a]ny person may petition

an agency requesting the adoption, amendment or repeal of any rule."[3]

6. Section 536.016 requires that a rulemaking be based upon "substantial evidence on the record and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority." There is no authority that suggests that § 536.016 does not apply to a rulemaking initiated under § 536.041. Therefore, the Motion for Proposed Rulemaking must be considered to include a motion for a finding that the proposed amendment of Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings,* is necessary to carry out the purposes of § 386.410, the statute by whose authority Commission Rule 4 CSR 240-4.020, *Conduct During Proceedings*, was promulgated. That statute provides in pertinent part, "All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission."

7. In the Motion for Proposed Rulemaking, the Movants state that a rulemaking is necessary because "Recent events that have occurred in Case Nos. ER-2007-0291 and EM-2007-0374 have raised issues regarding improprieties associated with *ex parte* communications between utility executives and Commissioners."[4] *Motion for Proposed Rulemaking,* ¶ 1. "Indeed, in

[3] All statutory citations, unless otherwise indicated, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[4]With respect to Case No. EM-2007-0374, the Commission has pointed out that conversations in question occurred before the case was filed and thus the characterization of the conversations as "*ex parte*" is not legally accurate. *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief ("GPE-Aquila Merger Docket"),* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) pp. 16-17.

response to the appearance of impropriety, the Governor has called upon the Commission "to review their policies on conflicts of interest." *Id.*

8. The Motion goes on to say:

> Modifications to the Commission's current rule, 4 CSR 240-4.020, should help clarify the procedures by which the Commission may engage in communications with parties or those companies and individuals that are likely to seek Commission action. By making these changes to the current rule, the Commission, consistent with the Governor's request, can ensure that utility matters are being decided "fairly and impartially."
>
> Consistent with these goals, the parties have proposed the attached modifications to 4 CSR 240-4.020.

*Motion for Proposed Rulemaking,* ¶¶ 2 & 3.

9. Staff has demonstrated elsewhere that, with respect to Case No. EM-2007-0374, no impropriety on the part of Commissioners Murray, Clayton and Appling occurred.[5] *See In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief ("GPE-Aquila Merger Docket"),* Case No. EM-2007-0374, *Staff's Response to Public Counsel's Motion to Dismiss,* filed on December 27, 2007. This was also the conclusion of the Commission itself: ". . . OPC relies on conclusory statements, fractionated legal precepts and innuendo to assert that no necessary quorum of this Commission could objectively preside over and render an impartial decision in this matter. The motion shall be denied as being meritless." *GPE-Aquila Merger Docket, Order*

[5] Chairman Davis did recuse himself, *see GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Notice of Recusal for Chairman Davis,* filed December 6, 2007), although it is clear that no impropriety occurred with respect to Chairman Davis, as well. Commissioner Jarrett was not a member of the Commission at the time the conversations in question occurred.

*Denying Motion to Dismiss,* p. 1. It is also the case that no impropriety occurred in Case No. ER-2007-0291, *See In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement Its Regulatory Plan,* Case No. ER-2007-0291, *Response to Requests for Recusal,* filed October 9, 2007.[6]

10. Although no improprieties occurred, the Commission has nonetheless been the subject of notably adverse comment in the media, culminating on December 6, 2007 – the day on which Chairman Davis recused himself from the GPE-Aquila Merger Docket, Case No. EM-2007-0374 -- with an editorial in the St. Louis Post-Dispatch titled "the Power Fixers," in which the Commission was characterized as "a secret partner of big utilities – catering to corporate executives in closed-door meetings in which ordinary ratepayers are not represented." Governor Blunt's press release, calling on the Commission to "review [its] policies on conflicts of interest following accusations" of inappropriate communications with utility executives was also issued on December 6, 2007. In summary, Staff notes that the circumstances cited by Movants as necessitating the unlawful amendment they propose consist of expressions of public concern rather than any actual improprieties or violations of law.[7]

[6] Commissioner Appling indeed eventually did recuse, but not because any impropriety had occurred: "Although my attorneys advise me that the petition is not well-founded, I cannot and will not waste the resources and energy of my fellow Commissioners, the parties to the rate case, or the Court of Appeals in further vindicating my personal position. I will therefore recuse myself from this case." *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement Its Regulatory Plan,* Case No. ER-2007-0291 (*Notice,* filed October 25, 2007).

[7] Staff expresses no opinion as to whether the negative media commentary directed at the Commission was manipulated by any party or stakeholder in order to advance its particular interests or to gain a litigation advantage.

11. It is Staff's view that the proposed amendments are not necessary, and are unworkable and unlawful, because they are not the right amendments. Again, it is Staff's view that the rights of the various stakeholders are amply protected by the existing framework of statutes, rules and case law. The Commission has recently reviewed the applicable jurisprudence.[8] But that is not to say that a refinement of the Commission's rules would not be of benefit

***Is the Proposed Rulemaking Lawful?***

12. It is well-established that administrative rules may only be promulgated within the scope of the authorizing legislation. *State ex rel. Doe Run Company v. Brown,* 918 S.W.2d 303, 306 (Mo. App., W.D. 1996). An administrative rule that is contrary to statute is a nullity. "The rules or regulations of a state agency are invalid if ... they attempt to expand or modify statutes. Further, regulations may not conflict with the statutes and if a regulation does, it must fail." *Hansen v. State Dept. of Social Services, Family Support Div.,* 226 S.W.3d 137, 144 (Mo. banc 2007), quoting *PharmFlex, Inc. v. Division of Employment Security,* 964 S.W.2d 825, 829 (Mo. App., W.D. 1997).

13. Section 386.210, RSMo Supp. 2007, governs communications between the Commissioners and other persons outside of evidentiary hearings and provides in pertinent part:

> 1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any

[8] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) pp. 2-4.

matter relating to the performance of its duties.

2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.

3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:

(1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;

(2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or

(3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:

(a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;

(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such

communications comply with the provisions of subsection 3 of this section.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

* * *

14. It is immediately apparent that the amendments proposed by the Movants are contrary to § 386.210, RSMo. Supp. 2007, or other provisions of law, and are thus unlawful:

A. At proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is contrary to established legal usage and, additionally, prohibits communications that are otherwise lawful under § 386.210, RSMo. Supp. 2007.

B. Movants propose deleting present subsection (7) of Rule 4 CSR 240-4.020, which states when the prohibitions on communications in the rule apply, although the subsection restates the timing provisions contained in the statute.

C. Proposed subsection (10) is contrary to both § 386.450 and the provisions of Chapter 610, RSMo, constituting the "Missouri Sunshine

Law," and is thus unlawful.

D. Additionally, the proposed amendments are unlawful because they would prevent the Commissioners from discharging their duties under the statutes.

***Is the Proposed Rulemaking Practicable?***

15. It is also apparent that the proposed amendments are not practicable:

A. As noted previously, at proposed subsection (1)(A), Movants propose to extend the ban on *ex parte* communications to encompass matters that, while not pending before the Commission, "can reasonably be foreseen to come before the Commission for decision." This definition is so incredibly overly expansive as to effectively prohibit any communication by a Commission member with almost anyone on any matter relating to the business of the Public Service Commission.

B. Proposed subsection (4) does not use the term "ex parte communication" that Movants have carefully (and over-expansively) defined at proposed subsection (1)(A) and is thus ambiguous. By referring to "the merits of the cause," do Movants intend this prohibition to apply only to pending cases?

C. Movants propose to amend existing subsection (8) to provide that reports of inadvertent *ex parte* communications must be either filed publicly in the appropriate pending case or, if no case is pending, copies to "each party to the utility's most recent general rate case or earnings

complaint case." This proposal imposes an onerous and expensive reporting burden upon the Commission.

D. The language "to an individual Commissioner or to any two Commissioners or to a quorum of the Commission" at proposed subsection (10) is poorly drafted and redundant. Additionally, why should the prohibition in subsection (10) apply only to utilities? Prohibitions should apply to all parties and stakeholders equally.

E. Proposed subsection (11) imposes an expensive obligation upon the Commission that serves no public purpose. Let those who desire transcripts of the Commission's open meetings pay for reporters and copies of transcripts. What public purpose is served by making a verbatim record of the Commission's closed meetings? If a person or entity wants to challenge the Commission's closing of a meeting, the burden is on that person or entity. The Movants appear to seek to establish a presumption of misconduct on the part of the Commissioners. Such a presumption is contrary to settled Missouri law, which presumes that administrative officers act properly and lawfully. [9]

F. Proposed subsection (12) is unworkable. It is inappropriate for the Public Counsel, let alone private parties, to have any investigatory authority with respect to the Commission. The Public Counsel is hardly disinterested and there are no provisions proposed that would prevent the Public Counsel from abusing this authority.

[9] *GPE-Aquila Merger Docket,* Case No. EM-2007-0374 (*Order Denying Motion to Dismiss,* issued January 2, 2008) p. 6.

G. Proposed subsection (14) is unworkable. Who will determine that an *ex parte* communication was made?

H. Proposed subsection (15) is unnecessary as it merely restates existing law.

I. Additionally, the proposed amendments are not practicable because they would prevent the Commissioners from discharging their duties under the statutes.

16. Staff also files this pleading as its contribution to Case No. AO-2008-0192.

**WHEREFORE,** on account of all the foregoing, Staff prays that the Commission will not promulgate the amendments to Rule 4 CSR 240-4.020 proposed herein by Movants; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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Missouri Public Service Commission

## Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this **4th day of January, 2008.**

**/s/ Kevin A. Thompson**

# BEFORE THE PUBLIC SERVICE COMMISSION
# STATE OF MISSOURI

| | | |
|---|---|---|
| In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief | ) ) ) ) ) ) ) ) | **Case No. EM-2007-0374** |

## STAFF'S RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

**COMES NOW** the Staff of the Missouri Public Service Commission ("PSC"), by and through the Commission's General Counsel, and for its Response to Public Counsel's Motion to Dismiss, states as follows:

### *Introduction*

1. The Commission's Staff, like Public Counsel, opposes the proposed transaction that is the subject of this case. Staff opposes the transaction because, in Staff's expert opinion, it is a bad deal for ratepayers in that it would certainly result in higher rates in the short-run while offering only an ephemeral possibility of benefits in the long-run. As Mr. Conrad aptly characterized it, the ratepayers are being asked to pay now for "pie in the sky, bye and bye."[1]

2. Nonetheless, Staff here responds in opposition to Public Counsel's Motion to Dismiss. That Motion asserts that this case must be dismissed because certain conduct by four of the five Commissioners has created an

[1] Staff has elsewhere addressed at length the many detrimental aspects of the proposed transaction and so will not review them here. *See Staff's Prehearing Brief,* filed on November 27, 2007, and *Rebuttal Testimony of Robert E. Schallenberg and Staff Report,* filed on October 12, 2007.

"appearance of impropriety" such that the Commissioners would each be required to recuse were they judicial officers. Staff writes because Mr. Mills has seriously misstated the law applicable to the conduct of the members of the Missouri Public Service Commission.

***Summary of Staff's Position***

3. The PSC Commissioners are not judicial officers, but administrative officers. Administrative officers are not – and cannot be, as a matter of the Constitutional separation of powers -- subject to the Canons of Judicial Ethics. In particular, administrative officers need not recuse where there is a mere appearance of impropriety. It is well-established that administrative officers need not recuse where they have foreknowledge of specific facts, have formed opinions on matters of policy, and even have reached tentative conclusions on contested issues prior to the hearing of a contested case. When the conduct complained of here is measured against the standards that actually apply to the PSC Commissioners, it is clear that no impropriety has occurred and no recusal is required. In any event, when allegations of bias are made against a majority of the members of an administrative tribunal, such that the tribunal could not act were the challenged members to recuse, the Rule of Necessity permits the challenged members of the tribunal to participate so that the public's business may move forward. In such a case, the administrative decision is subject to heightened scrutiny on judicial review.

***The Conduct***

4. The conduct in question consisted of "a series of four or five meetings

. . . held with just one or two Commissioners attending each meeting" that occurred "[o]n or about January 24, 2007[.]" *OPC Motion* at ¶ 1. The purpose of these meetings was so the Joint Applicants could determine "that no Commissioner had any objection to the three 'support mechanisms' that Great Plains would later submit for Commission approval." *OPC Motion* at ¶ 2. It is Mr. Mills' position that the Joint Applicants obtained what they sought:

> After their meetings, Mr. Chesser testified that he and Mr. Green "had a general conversation that said that we both had a **favorable** impression from the meetings." Mr. Green went even farther: he said that Mr. Chesser reported back "similar **support**" from both Kansas and Missouri regulators.

*OPC Motion* at ¶ 3 (internal citations omitted; emphasis as in the original).

***Public Counsel's Motion***

5. Based on these allegations, Public Counsel asserts that "Commissioners Murray, Appling and Clayton have conducted themselves in such a manner that their recusal is necessary." *OPC Motion* at ¶ 18. Public Counsel reaches this conclusion based on his belief that "[u]nder the Canons of Judicial Conduct 2.03, Commissioners, like judges, must avoid even the appearance of impropriety." *Id.* However, the Canons of Judicial Conduct simply do not apply to the PSC Commissioners as administrative officers of the executive department; rather, they are subject to a different set of rules that does *not* require recusal for the mere appearance of impropriety.

6. Public Counsel's avowed purpose in filing his Motion to Dismiss is to render the PSC unable to act at all:

> Commissioners Murray, Appling and Clayton have conducted themselves in such a manner that their recusal is necessary. While

> a request for recusal would be appropriate, and the Commissioners should certainly concede that there is a marked appearance of impropriety and the public's faith in their impartiality has been destroyed, recusal would leave the case in limbo. With four Commissioners recused from the case, there would be no way for the Commission as a body to act. Relief could be neither granted nor denied. In this extraordinary circumstance, where a majority of the tribunal is tainted by participation in secret discussions, outright dismissal is the most appropriate course.

*OPC Motion* at ¶ 18. Staff suggests that a serious infringement of the right of the public and the Joint Applicants to a determination of the application would occur were the Commission to be left unable to act. However, as is discussed below, the law has provided for such a possibility through the doctrine of the Rule of Necessity.

### ***The Public Counsel Has Misread*** **Slavin**

7. The central thesis of Public Counsel's Motion is that the PSC Commissioners are subject to the same rules of conduct as are judicial officers:

> Public Service Commissioners exercise quasi-judicial power and are subject to the same rules of conduct that apply to the judiciary. (Footnote:) "[T]he courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them." *Union Electric Co. v. Public Service Com.,* 591 S.W.2d 134 (Mo. Ct. App. 1979) [the "Slavin case"].

*OPC Motion* at ¶ 6 and n. 18.[2]

8. Public Counsel relies principally on the *Slavin* case, properly denominated *Union Electric Co. v. Public Service Com.,* 591 S.W.2d 134 (Mo. App. 1979), cited in the preceding paragraph. However, the *Slavin* case is not on

[2] *See similar statements in State ex rel. Martin-Erb v. Missouri Comm'n on Human Rights,* 77 S.W.3d 600, (Mo. banc 2002), and *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003). Each of these cases, however, is limited to its particular facts.

point. The conduct in question in *Slavin* was entirely different and, indeed, the *Slavin* case serves to illustrate the difference between the rules applicable to judicial officers and those applicable to administrative officers. In *Slavin,* it was not an appearance of impropriety that required recusal, but rather an *actual* impropriety.

9. The *Slavin* court applied the common law rule "that no man is to be a judge in his own cause" to disqualify Commissioner Alberta Slavin from participation in a case in which she had previously participated as a named party prior to her appointment to the Commission:

> In this case it is stipulated that Slavin was a party to case No. 18177, and that by order of the Commission in January, 1978, after she became a member of the Commission, case No. EO78-163 [*sic*] was opened and all parties to No. 18177 were made parties to No. EO78-163 [*sic*]. By this order Slavin then became a party to a case pending before her as a member of the Commission.

*Supra,* 591 S.W.2d at 136 and 138.

10. The several cases considered by the Court of Appeals in *Slavin* similarly concerned *actual* improprieties of the same sort: a County Court Commissioner who participated in a proceeding involving land owned by his wife, *King's Lake Drainage & Levee Dist. v. Jamison,* 176 Mo. 557, 75 S.W. 679 (1903); a Commissioner of the Ohio PUC who heard a case to which he had been a party prior to his appointment, *Forest Hills Utility Co. v. Public Utility Comm'n of Ohio,* 313 N.E.2d 801 (Oh. 1974); a member of the federal Civil Aeronautics Board who heard a case in which he had participated as an advocate prior to his appointment, *Trans World Airlines v. Civil Aeronautics Bd.,*

102 U.S.App.D.C. 391, 254 F.2d 90 (D.C. Cir. 1958); a member of the Federal Trade Commission who heard a case in which he had participated as an advocate prior to his appointment; *American General Ins. Co. v. F.T.C.,* 589 F.2d 462 (9th Cir. 1979). All of these cases, like *Slavin,* concern the particular impropriety of a conflict of interest and demonstrate that the word "interest," as used by the Court of Appeals in *Slavin* in the quotation set out by Mr. Mills and reproduced above, means a tangible, personal interest or stake in a case rather than a mere appearance of impropriety. None of the PSC Commissioners has any personal interest in the present matter of the sort considered in *Slavin* and Public Counsel has not alleged that they do. Rather, the present matter involves alleged prejudgment or bias rather than a conflict of interest.

11. The *Slavin* decision should not be cited as authority that administrative officers are held to the same standards as judicial officers in all respects because the *Slavin* court did not so hold. The *Slavin* holding was much more narrow and was limited to the actual facts before the court:

> It is clear from *King's Lake, Forest Hills Utility Company,* and *American General Insurance* that the same standards and rules apply to quasi-judicial officers as to judicial officers. **This means that members of the Public Service Commission may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party.** This is true under the common law rule that no man may be the judge of his own cause. As stated in *Jones* it is also a requisite of due process to which every party is entitled.

*Slavin, supra,* 591 S.W.2d at 139 (emphasis added). Note that *Slavin* held that a Commissioner may not participate where the Commissioner is "prejudiced." This

is the cause for recusal alleged in the present case and so will be examined in detail below.

***The PSC Commissioners are Administrative Officers, Not Judges***

12. Missouri courts have repeatedly stated, "The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created." *State ex rel. Laundry, Inc. v. Public Service Com'n,* 327 Mo. 93, ___, 34 S.W.2d 37, 43 (1931). The Commission members are thus administrative officers, and "[w]hatever power the [Commission] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective." *State ex rel. City of St. Louis v. Public Service Com'n of Missouri,* 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (*banc* 1934). Many more examples of the restatement of these principles by Missouri courts could be provided.

13. The PSC Commissioners, "appointed by the governor, with the advice and consent of the senate," § 386.050, RSMo Supp. 2007, are state officers of the Executive Department: "The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. Mo. Const., Art. iv, § 12. Judicial officers, by contrast, are members of a separate magistracy and are cloaked with judicial authority. Mo. Const., Art. ii, § 1.

14. Under the doctrine of the separation of powers, the Missouri Supreme Court cannot make rules governing the conduct of officers of the

Executive Department. *See Weinstock v. Holden,* 995 S.W.2d 408 (Mo. banc 1999). In *Weinstock,* the Missouri Supreme Court invalidated a statute that prohibited a person "serving in a judicial or quasi-judicial capacity" from participating "in such capacity in any proceeding in which . . . [t]he person knows the subject matter is such that the person may receive a direct or indirect financial gain from any potential result of the proceeding." 995 S.W.2d at 408. The Supreme Court invalidated the statute because it violated the doctrine of the separation of powers in that the Missouri Constitution reserves to the Court the power to "establish rules relating to practice, procedure and pleading for all courts," including the "authority to regulate the practices of judges and lawyers in the courts of this state." *Id.,* at 410. The Court pointed out that "[t]he doctrine of separation of powers, as set forth above in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization of power." *Id.* Thus, the PSC Commissioners *cannot* be subject to the Rules of Judicial Conduct.

15. By its terms, Rule 2 applies *only* to judicial officers. Rule 2.04; *State ex rel Kramer v. Walker,* 926 S.W.2d 72, (Mo. App., W.D. 1996). Public Counsel has not cited a single authority, and Staff has found none, in which the Canons of Judicial Conduct were applied to an administrative officer. Thus, Mr. Mills' references to Canons 3B(7) and 3E(1), and to cases applying and interpreting those rules, are irrelevant to the conduct in question here. Even less relevant is Public Counsel's citation to 28 U.S.C.S. § 455(a), a federal statute applicable by its terms only to judicial officers of the United States.

***The Conduct in Question Did Not Violate Any of the Rules of Conduct Properly Applicable to Members of the PSC***

16. The conduct herein under discussion did not violate any of the rules of conduct that actually apply to PSC Commissioners. These rules of conduct are found in the state statutes at Chapters 105 and 386, RSMo,[3] in the PSC's own rules at 4 CSR 240-4.010 and 4 CSR 240-4.020, and in the Constitutions of Missouri and of the United States.

17. Sections 105.452, 105.454, RSMo Supp. 2007, and 105.462 contain various rules of conduct applicable, in the case of § 105.452, to all state employees, in the case of § 105.454, RSMo Supp. 2007, only to state employees "serving in an executive or administrative capacity,"[4] and, in the case of § 105.462, applicable only to persons exercising rulemaking authority. All of these provisions apply to PSC Commissioners, but the conduct complained of herein by Public Counsel does not violate the provisions of any of these sections.[5] Section 105.464.1 applies to persons exercising judicial and quasi-judicial authority, and provides that "[n]o person serving in a judicial or quasi-judicial capacity shall participate in such capacity in any proceeding in which the

[3] All statutory references herein, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[4] There are four reported cases involving § 105.454, RSMo Supp. 2007. One holds that a declaratory judgment action will not lie to determine whether or not a proposed course of action is violative of the statute. *Cottleville Community Fire District v. Morak,* 897 S.W.2d 647 (Mo. App., E.D. 1995). Another holds that it does not apply to superintendents of school districts. *State v. Hodge,* 841 S.W.2d 658 (Mo. banc 1992). The other two concerned the impeachment of mayors where violation of the statute was one of the specifications of the bill of impeachment or the indictment. *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52 (Mo. App., E.D. 1990); *State v. Patterson,* 729 S.W.2d 226 (Mo. App., S.D. 1987).

[5] These statutes prohibit the exercise of governmental power to enrich oneself or one's family, as well as bribery, the improper use of confidential information, and certain activities after the termination of state employment.

person knows that a party is any of the following: the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin." This language describes a conflict of interest, not bias or prejudgment. The conduct complained of by Public Counsel is not violative of § 105.464.1.

18. Section 386.210, RSMo Supp. 2007, governs communications between the Commissioners and other persons outside of evidentiary hearings and provides in pertinent part:

> 1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.
>
> 2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.
>
> 3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
>
> > (1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;
> >
> > (2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
> >
> > (3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:

(a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;

(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

* * *

The meetings in question occurred, according to the Public Counsel, "on or about January 24, 2007[.]" *OPC* Motion at ¶ 1. The Joint Application that initiated this case was not filed until April 4, 2007. *EFIS Docket Sheet,* Case No. EM-2007-0374. Therefore, pursuant to § 386.210, 1 and 2, the Commissioners were free

to confer with any person on any topic, including issues and substantive and procedural matters likely to arise in a case not yet filed. *Compare* § 386.210, 1 and 2, to § 386.210.4, RSMo Supp. 2007. Furthermore, the Commissioners were free to express opinions on those issues. *Compare* § 386.210, 1 and 2, to § 386.210.5, RSMo Supp. 2007.

8. The Commission has itself adopted rules of conduct at 4 CSR 240-4, 010, "Gratuities," and 020, "Conduct During Proceedings." The second of these applies to communications between members of the Commission and interested parties and is therefore set out below in full:

> (1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:[6]
>
> (A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:
>
> 1. Evidence regarding the occurrence of transaction involved;
>
> 2. The character, credibility or criminal record of a party, witness or prospective witness;
>
> 3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;

[6] Staff specifically expresses no opinion as to the propriety of the actions of any party, or the representative of any party, to this matter under either Rule 4 CSR 240-4.020 or Supreme Court Rule 4, the Rules of Professional Responsibility.

4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding.

(5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited

> *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.
>
> (7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.
>
> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

9. Several provisions of Rule 4 CSR 240-4.020 apply to prohibit communications of the sort complained of herein by the Public Counsel. However, the prohibition is strictly limited in time. Thus, subsection (2) by its terms applies only to matters that are "pending," that is, matters that are the subject of a formal proceeding in which some pleading has been filed with the Commission and a numbered docket opened. Likewise, subsections (6) and (8) apply, according to subsection (7), only "from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission." The scope of subsections (6) and (8) are thus more limited than subsection (2) in that, with respect to subsections (6) and (8), the matter must not only be pending but also set for hearing. The

conduct complained of herein by the Public Counsel did not violate any provision of Rule 4 CSR 240-4.020.

***Procedural Due Process Does Not Require Dismissal***

19. Also applicable to the PSC are the Due Process Clauses of the Missouri and United States Constitutions.[7] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity. *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003), *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. E.D.1990), *both citing Withrow, supra,* 421 U.S. at 46, 95 S.Ct. at 1464, 43 L.Ed.2d at 723. Thus, administrative decision-makers must be impartial, *AG Processing, supra,* and "free of bias, hostility and prejudgment." *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 596 (Mo. App., E.D. 1987); *Jones v. State Dept. of Public Health and Welfare,* 345 S.W.2d 37, 40 (Mo. App., W.D. 1962). "The cardinal test of the presence or absence of due process in an administrative proceeding is defined . . . as 'the presence or absence of rudiments of fair play long known to the law.'" *Jones, supra*.

20. However, the impartiality required of an administrative officer is not quite the same as the impartiality expected of a judicial officer. An administrative officer is not expected to be a *tabula rasa:* "Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise." *Hortonville Joint School Dist. No. 1 v. Hortonville*

[7] Mo. Const., Art. I, § 10; U.S. Const., Amd. 14, § 1.

*Education Assoc.,* 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976); *Fitzgerald, supra*. Indeed, administrative officers may permissibly have not only "preconceived notions concerning policy issues" and familiarity with the actual facts of a case, but are allowed to have even reached a "tentative conclusion":

> **Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker**, *Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir.1973), "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Hortonville Joint School District,* 96 S.Ct. at 2314.

*Fitzgerald, supra* (emphasis added).

21. Public Counsel has shown that meetings occurred, before this matter was filed, at which officers of the Joint Applicants disclosed the details of the proposed transaction to the members of the Commission. Public Counsel seeks to imply, further, that some of the members of the Commission, at least, expressed approval of the particular ratemaking treatment necessary to support the proposed transaction. Public Counsel may thus have shown "[f]amiliarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing," *Fitzgerald, supra,* 796 S.W.2d at 59, but this showing "does not necessarily disqualify an administrative decisionmaker[.]" *Id.* What Public Counsel has *not* shown is that the members of the PSC are "not 'capable of judging [this] particular controversy fairly on the basis of its own circumstances.'" *Fitzgerald, supra,* 796 S.W.2d at 59, quoting

*Hortonville Joint School District, supra,* 96 S.Ct. at 2314. In the absence of such a showing, there is no denial of Due Process.

***The Public Counsel has Not Shown Actual Bias, Prejudice or Prejudgment***

22. Bias exists where an "administrative decisionmaker . . . has made an unalterable prejudgment of operative adjudicative facts[.]" *Fitzgerald, supra.* Where bias exists, the officer in question may not participate in the proceedings. *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, (Mo. App., E.D. 1987); *In re Weston Benefit Assessment Special Road District of Platte County,* 294 S.W.2d 353, (Mo. App., W.D. 1956).

23. "[A]dministrative decisionmakers are no more expert at determining their impartiality than judges are at determining theirs." *Orion Security, Inc. v. Board of Police Commissioners of Kansas City,* 90 S.W.3d 157, 164 (Mo. App., W.D. 2002), quoting *Fitzgerald, supra,* 796 S.W.2d at 59. Because the Public Service Commission Law places the PSC Commissioners in the position of adjudicators making findings of fact and conclusions of law, "the determination of the existence of their impartiality should be reviewed using the same standard used to review a judge's determination of his or her challenged impartiality." *Orion, supra,* 90 S.W.3d at 164. The inquiry is an objective one and must be based upon the whole record and not solely on the basis of the judge's conviction of his own impartiality. *Orion, supra; see Fitzgerald,* 796 S.W.2d at 59; *see also In re Marriage of Burroughs,* 691 S.W.2d 470, 474 (Mo. App.1985). The relevant inquiry is whether, on the whole record, a reasonable person would have factual

grounds to doubt the officer's impartiality. *Fitzgerald, supra,* 796 S.W.2d at 59-60.

24. A presumption exists that administrative decision-makers act honestly and impartially and a party challenging the partiality of the decision-maker has the burden to overcome that presumption. *AG Processing, supra,* at 920; *Orion, supra; Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App., E.D.1996); *Wagner v. Jackson County Board of Zoning Adjustment,* 857 S.W.2d 285, 289 (Mo. App., W.D. 1993).

25. It should be noted here that it is not at all unusual in administrative proceedings for the members of the agency to have familiarity with the facts of a particular case and the issues presented by it prior to the evidentiary hearing. It is common, for example, in the area of the regulation of licensed professionals that the appropriate board or commission both authorizes the initiation of disciplinary proceedings and, after the determination of the Administrative Hearing Commission that discipline is appropriate, imposes sanctions upon the erring licensee. Indeed, it is not *per se* objectionable where the board both initiates the prosecution and tries the case:

> Where the charge is general medical incompetency rather than specific medical misconduct, the Board [of Healing Arts] serves as investigator, prosecutor, judge, and jury. Although a neutral decisionmaker is preferable, the mere fact that the Board both initiates a charge and then tries it, does not, by itself, violate due process.

*Artman v. State Board of Registration for the Healing Arts,* 918 S.W.2d 247, 250 (Mo. banc 1996), citing *Rose v. State Board of Registration for the healing Arts,* 397 S.W.2d 570 (Mo. 1965).

26. Public Counsel has shown conduct that, on the part of judicial officers, would violate the Canons of Judicial Conduct and require the recusal of judicial officers based on the appearance of impropriety. However, as has been shown, the PSC Commissioners are not subject to the Canons of Judicial Conduct. The PSC Commissioners need not recuse to avoid the mere appearance of impropriety. Most importantly, Public Counsel has *not* shown that any impropriety occurred when the conduct in question is measured against the rules that actually do apply to the PSC Commissioners. Consequently, it cannot be concluded that a reasonable person would have factual grounds to doubt the impartiality of the members of the Commission.

***The Rule of Necessity Permits This Case to Proceed***

27. The Rule of Necessity allows "an otherwise disqualified decisionmaker to participate if a decision is necessary and there is no alternative." *Stonecipher v. Poplar Bluff R1 School District,* 205 S.W.3d 326, 328 (Mo. App., S.D. 2006). The Rule of Necessity is based on the litigants' right to have their dispute adjudicated. *Id.,* at 330, citing *U.S. v. Will,* 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), and *Evans v. Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). "The reason behind the rule of necessity is that denying any individual access to courts for the vindication of rights is a far more egregious wrong than for a judge to sit in a case that may economically benefit the judge." *Weinstock v. Holden,* 995 S.W.2d 408, 410 (Mo. banc 1999), citing *Rose, supra.* Interestingly, in view of Public Counsel's attempt to apply the Canons of Judicial Conduct to the PSC Commissioners, the Missouri Supreme

Court has observed that the Rule of Necessity applies in Missouri to permit adjudication to go forward even where judicial officers would otherwise be required to recuse. *Weinstock, supra,* 995 S.W.2d at 409-410. "[T]he canons now specifically make an exception from the recusal requirement where to follow the canons would result in no judge being able to decide the case." *Id.*

28. The Missouri Supreme Court has held that the Rule of Necessity applies to Missouri administrative agencies. *Rose v. State Board of Registration for the Healing Arts, supra,* 397 S.W.2d at . In *Rose,* a physician sought to avoid professional discipline by disqualifying the entire tribunal, much as Public Counsel here seeks to require dismissal by disqualifying four of the five PSC Commissioners. The Court held that, "even if the hearing board is possessed of prior knowledge of the matters in hearing, necessity dictates that the only board authorized to hold the hearing must proceed." *Id.,* at 575.

29. Similarly, in *Fitzgerald, supra,* the court found that three of six city council members sitting as an impeachment panel to determine charges against the mayor were likely biased due to the mayor's prior vituperative attacks upon them. *Supra,* 796 S.W.2d at 60. However, noting that disqualifying the three challenged councilmen would have disabled the impeachment panel, which could only act upon the vote of two-thirds, or six, of its eight elected members, the court held that "[d]ue process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make. Under such circumstances, the so-called Rule of Necessity permits an adjudicative body to proceed in spite of its possible bias or self-interest." *Id.*

(emphasis in original)*; State ex rel. Powell v. Wallace,* 718 S.W.2d 545, 548 (Mo. App., E.D. 1986).

30. The Joint Applicants have an absolute right under the law to have the Commission act upon their application. "To deny them that right would be to deny to them an incident important to ownership of property." *State ex rel. City of St. Louis v. Public Service Com'n of Missouri,* 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). This is a right, therefore, of constitutional dimension. "Disqualification can not [*sic*] be allowed to bar the doors to justice or to destroy the only tribunal vested with the power to act." *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437, 439 (Mo. App., W.D. 1988). It is clear that the Rule of Necessity must be applied here and that Public Counsel's Motion to Dismiss must be denied.

31. Public Counsel argues against applying the Rule of Necessity, but misstates the law:

> There may be response to this Motion to Dismiss citing the "rule of necessity," but that rule does not apply in this situation. The rule of necessity provides that if only one particular judge can hear a matter that must be adjudicated, that judge will be allowed to hear the matter even if there is some cause to disqualify him. Here, the joint applicants caused the situation in which they deliberately and consciously compromised the impartiality of the tribunal. They should not now be able to use the rule of necessity to allow that apparently partial tribunal to nonetheless decide the issues.

In fact, as demonstrated above, the Rule of Necessity *does* apply in this situation. Public Counsel cites no authority, and Staff has found none, supporting his assertion that the Rule should not be applied here because "the joint applicants caused the situation in which they deliberately and consciously

compromised the impartiality of the tribunal" and thus "should not now be able to use the rule of necessity to allow that apparently partial tribunal to nonetheless decide the issues." The Commission must apply the Rule of Necessity and go forward to determine the application before it. Should the four participating members of the Commission deadlock, the Chairman must participate to break the tie, despite his recusal. *See Barker, supra.*[8]

32. Staff notes that, where the Rule of Necessity is invoked to permit an administrative agency to act, the courts will subject the administrative action to heightened scrutiny to ensure that no injustice is done:

> The doctrine [i.e., the Rule of Necessity] is so clear that it is seldom litigated, but when it causes results that are palpably unjust, perhaps it ought to be litigated, because ways can sometimes be found to relieve against the injustice. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, without altering the law about scope of review, may and probably should review with special intensity.

*Barker, supra,* 752 S.W.2d at 441, quoting 3 K. Davis, *Administrative Law Treatise* § 19.9 (2nd ed. 1980).

***Conclusion***

33. "One of the fundamental precepts which govern the sound administration of justice is that, not only must justice be done, an appearance of justice must be maintained." *Barker, supra,* 752 S.W.2d at 439. Staff recognizes that there may be relevant prudential and public confidence considerations that might make Public Counsel's solution attractive. However, the review of the relevant law set out herein suggests that the Commission cannot dismiss the

[8] In *Barker,* the Court applied the Rule of Necessity to approve the participation of the Chairman of the Board of Industrial and Labor Relations, who cast the deciding vote in a case despite her earlier recusal where the remaining members had deadlocked. 752 S.W.2d at 442.

application without denying the procedural Due Process rights of the Joint Applicants. In Staff's opinion, the only lawful course open to the Commission is to render a decision on the merits of the application, supported by findings of fact based on the competent and substantial evidence of record and conclusions reached by applying existing law to those findings of fact. The heightened scrutiny that will be afforded this matter on judicial review will serve to protect the interests of the various parties.

**WHEREFORE,** on account of all the foregoing, Staff prays that the Commission will deny Public Counsel's Motion to Dismiss and determine the application herein on the merits as shown in the record of this matter; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

**/s/ Kevin A. Thompson**
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Missouri Public Service Commission

## Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this **27th day of December, 2007.**

**/s/ Kevin A. Thompson**

EXHIBIT 7

**STATE OF MISSOURI**
**PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 2nd day of January, 2008.

| | | |
|---|---|---|
| In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief. | ) ) ) ) ) | **Case No. EM-2007-0374** |

# ORDER DENYING MOTION TO DISMISS

Issue Date: January 2, 2008 Effective Date: January 2, 2008

**Syllabus:** On December 13, 2007,[1] the Office of the Public Counsel ("OPC") filed a pleading styled "Motion to Dismiss." The gravamen of OPC's motion concerns allegations of bias and prejudgment on the part of three Commissioners presiding over this matter. OPC's allegations are of a very serious nature, and the Commission approaches these allegations with the utmost commitment to thoroughly review and consider these allegations. Bearing this commitment in mind, the Commission must conclude that OPC's analysis of the legal issues identified in its motion is at best incomplete and at worst misleading. OPC fails to accurately cite to the proper controlling law or to any factual evidence to provide a basis for granting its motion. Instead, OPC relies on conclusory statements, fractionated legal precepts and innuendo to assert that no necessary quorum of this Commission could objectively preside over and render an impartial decision in this matter. The motion shall be denied as being meritless.

[1] All dates throughout this order refer to the year 2007 unless otherwise noted.

## The Commission's Quasi-Judicial Authority and Procedural Due Process

The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.[2] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.[3] Thus, administrative decision-makers must be impartial.[4] Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them.[5] A presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption.[6] A judge or administrative decision-maker is without jurisdiction, and a writ of prohibition would lie, if the judge or decision-maker failed to disqualify himself on proper application.[7]

The Commission's quasi-judicial power is exercised in "contested cases," meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.[8] It is only when the Commission exercises its quasi-judicial power that full procedural due process

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[2] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Union Elec. Co. v. Pub. Serv. Comm'n,* 591 S.W.2d 134, 137 (Mo. App. 1979).

[3] *Thompson*, 100 S.W.3d at 919 -920; *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. 1990) (citing *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)).

[4] *Id.*

[5] *Thompson*, 100 S.W.3d at 919-920; *Union Elec. Co.,* 591 S.W.2d at 137.

[6] *Thompson*, 100 S.W.3d at 919-920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[7] *Thompson*, 100 S.W.3d at 919-920; *State ex rel. Ladlee v. Aiken,* 46 S.W.3d 676, 678 (Mo. App. 2001); *State ex rel. White v. Shinn,* 903 S.W.2d 194, 196 (Mo. App.1995).

[8] Section 536.010(4), RSMo 2000. An agency decision which acts on a specific set of accrued facts and concludes only them is an adjudication. *Ackerman v. City of Creve Coeur*, 553 S.W.2d 490, 492 (Mo. App. 1977). *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979).

protections come into play.[9] "Due process requires an impartial decision maker, but it also presumes the honesty and impartiality of decision makers in the absence of a contrary showing."[10]

"Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise."[11] "Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker,"[12] "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[13] An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[14] "Conversely, any administrative decisionmaker who has made an **unalterable prejudgment of operative adjudicative facts is considered biased**."

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[9] "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). The PSC is not obligated to provide evidentiary procedures at rulemaking hearings other than providing the opportunity to "present evidence." Cross-examination of witnesses and the presentation of rebuttal evidence are procedures employed in contested cases but not rulemaking hearings. *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759 - 760 (Mo. banc 2003).

[10] *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 413 (Mo. banc 2007). See also *Mueller v. Ruddy,* 617 S.W.2d 466, 475 (Mo. Ct. App. 1981); *Fitzgerald,* 796 S.W.2d at 59.

[11] *Fitzgerald*, 796 S.W.2d at 59; *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.,* 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976).

[12] *Fitzgerald*, 796 S.W.2d at 59; *Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir. 1973).

[13] *Fitzgerald*, 796 S.W.2d at 59 (Mo. App. 1990); *Hortonvillet,* 96 S.Ct. at 2314.

[14] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).

(Emphasis added.)[15] "Because of the risk that a biased decisionmaker may influence other, impartial adjudicators, the participation of such a decisionmaker in an administrative hearing generally violates due process, even if his [or her] vote is not essential to the administrative decision."[16]

**OPC's Allegations**

OPC alleges that Commissioners Murray, Appling, and Clayton participated in non-public meetings with Michael J. Chesser, Chief Executive Officer of Great Plains Energy, Inc. ("GPE") and Chairman of the Board of both GPE and Kansas City Power & Light Company ("KCPL"), and with William H. Downey, Chief Operating Officer and Member of the Board of Directors for GPE, the holding company of KCPL, and the President and Chief Executive Officer of KCPL. OPC further asserts that the communications in these meetings, that occurred prior to the instant action being filed before the Commission, tainted the process in this proceeding so irreparably that none of these Commissioners should be able to preside over this matter or render a decision with regard to the proposed merger. OPC intimates that the meetings between the executives of the companies and the Commissioners were more than informational in nature and that they were designed to generate support for a favorable decision to support the merger. Finally, OPC claims that with Chairman Davis already being recused from this proceeding,[17] and with only one other commissioner remaining,

[15] *Fitzgerald*, 796 S.W.2d at 59.

[16] *Fitzgerald*, 796 S.W.2d at 59; *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 598 (Mo. App. 1987).

[17] Chairman Davis, *sua sponte*, recused himself from this matter on December 6, 2007.

Commissioner Jarrett, that the Commission is prevented, as a body, to even act upon this matter.[18]

## Relevant Statutes, Commission Rules, Judicial Canons and Case Law

### Section 386.210

The legislature has provided a bright-line law governing external communications with the Commissioners singularly or when sitting en banc. Section 386.210, RSMo Cum. Supp. 2006, provides, in pertinent part:

> 1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.
>
> 2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.
>
> 3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
>
> (1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;
>
> (2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
>
> (3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:
>
> (a) If the communication is written, the person or party making the communication shall no later than the next business day following the

[18] Commissioner Terry Jarrett was appointed to the Commission for a six-year term on September 11, 2007. Consequently, he was not a member of the Commission during the time period when the communications that are the subject of OPC's motion occurred. As OPC noted in its motion, Commissioner Jarrett is "not implicated in any way in the matter raised" in its motion.

communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;

(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

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**Commission Rule 4 CSR 240-4.020**

Commission Rule 4 CSR 240-4.020, entitled "Conduct During Proceedings," provides:

(1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:

(A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be

disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

1. Evidence regarding the occurrence of transaction involved;

2. The character, credibility or criminal record of a party, witness or prospective witness;

3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;

4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by

> undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding. (5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.
>
> (6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.
>
> (7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.
>
> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

The operative words of the Commission's rule is "conduct during proceedings." Subsection 7 of the rule makes clear that the prohibitions outlined in the rule apply only after a hearing is set to be decided upon the record made in that commission hearing.

**The Judicial Canons**

It is arguable as to whether the Judicial Canons apply to the Commissioners of administrative agencies.[19] Without addressing that issue directly, the Commission still

[19] The arguments on this put forth by the Commission's Staff and by GPE, KCPL and Aquila regarding whether the judicial canons apply are persuasive, but as the remainder of this order demonstrates, even if the Commission assumes, *arguendo*, that the canons do apply, this does little to rescue OPC's position. The standard for recusal is defined by case law, and that standard applies regardless of the wording of the judicial canons, and it is that standard that controls. The arguments herein referenced may be found

finds that several provisions of the Code of Judicial Conduct are illuminating. Canon 3(B)(5) provides that a judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice. More on point with the issues surrounding the external communications between corporate officers and the Commissioners that are raised by OPC in its motion is Canon 3(B)(7), which provides:

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
>
> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
>
> **(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.** (Emphasis added.)

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in *Staff's Response to Public Counsel's Motion to Dismiss*, filed December 27, 2007 and *Applicants' Opposition to Motion to Dismiss*, filed on December 26, 2007.

Canon 3E(1) provides a judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 2(A) provides that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The Commentary to Canon 2 provides: The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

**Legal Standard for Recusal**

In *Smulls v. State*,[20] the Missouri Supreme Court articulated the proper legal standard for recusal of a judge for an alleged violation of due process for having prejudged a matter or for being biased. The Court succinctly stated:

> Canon 3(D)(1) of the Missouri Code of Judicial Conduct, Rule 2.03, requires a judge to recuse in a proceeding where a "reasonable person would have a factual basis to doubt the judge's impartiality." *Id.* This standard does not require proof of actual bias, but is an objective standard that recognizes "justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1986). Under this standard, a "reasonable person" is one who gives due regard to the presumption "that judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial." *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996). In addition, a "reasonable person" is one "who knows all that has been said and done in the presence of the judge." *Haynes v. State,* 937 S.W.2d 199, 203 (Mo. banc 1996). Finally, as to due process challenges, the Supreme Court has made clear that "only in the most extreme of cases would disqualification on this basis be constitutionally required." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *see also State v. Jones,* 979 S.W.2d 171, 177 (Mo. banc 1998).[21]

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[20] *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002).

[21] *Id.*

"To qualify, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case."[22]

The Supreme Court has discussed, at length, the meaning of this standard in many cases and with regard to the presumption of a judge's impartiality the court has clarified: "that presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court."[23] Keeping in mind, of course, that a "reasonable person is one "who knows all that has been said and done in the presence of the judge."[24] The court has further stated: "The judge himself or herself is in the best position to decide whether recusal is necessary."[25] Moreover, "[a] judge has an affirmative duty not to disqualify himself unnecessarily."[26]

## Testimony at Hearing, Hearing Exhibits and Deposition Testimony

### OPC's Alleged Factual Basis For Its Motion to Dismiss

OPC alleges that on or about January 24, 2007, a series of four or five meetings were held between Commissioners Murray, Appling and Clayton (in groups of one or two commissioners) and Mr. Chesser and Mr. Downey, and that no notice was given to the public or to the OPC about these meetings. OPC, citing to various hearing exhibits, portions of transcripts and deposition passages, claims these discussions with Commissioners were critical to Great Plains moving forward with its plans to finalize a

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[22] *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998).

[23] *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996).

[24] *Smulls*, 71 S.W.3d at145.

[25] *Jones*, 979 S.W.2d at 178.

[26] *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996).

merger with Aquila. Quoting directly from OPC's Motion to Dismiss, OPC notes the following:

> "In a July 19, 2006, memo to the Great Plains board of directors, Terry Bassham, Chief Financial Officer of both Great Plains and KCPL, stated: "The regulators [*sic*] response to this plan and its concepts will be critical to our final evaluation of the transaction. Although it is not timely to speak to the regulators at this point, discussions with them in Phase II will clearly impact our ability to make a final offer." Exhibit 26, page 3. Before it would make a final bid for Aquila, before it would set its final price, before it would publicly announce the deal, Great Plains had to know that no Commissioner had any objection to the three "support mechanisms" (Chesser Deposition, page 39.) that Great Plains would later submit for Commission approval. Great Plains believed that these discussions were so absolutely critical that they were required in Great Plains' Final Bid:
>
> "In order to deliver a transaction which will create the immediate and sustainable long term value for Aquila and Great Plains' shareholders, we require informal discussions with regulators prior to the execution of a definitive merger agreement for this transaction. Our bid is subject to holding these discussions concurrent with the negotiation of the definitive Merger Agreement." Exhibit 121, page 2.
>
> Great Plains needed these discussions with Commissioners to "yield comfort" (Exhibit 26, page 3) around its ability to get approval consistent with its proposed regulatory treatment. The three support mechanisms or ratemaking treatments discussed with the Commissioners are: 1) a 50/50 split of synergies in the first five years; 2) regulatory amortizations for Aquila; and 3) recovery of the actual cost of Aquila's high cost of debt. (Chesser Deposition, pages 39-40.) Mr. Chesser and Mr. Downey did not just explain the mechanics of the transaction (the Black Hills piece of the deal, the Gregory acquisition subsidiary, etc.) to the Commissioners, they explained in detail what the joint applicants needed the Commission to approve once the issues were before the Commission for a decision.
>
> Great Plains needed to not only give the Commissioners this detailed information, but to get something in return. Great Plains wanted to have "conversations" (Exhibit 105, page 11) or "discussions" (Exhibit 101, page 3) with regulators; Mr. Chesser and Mr. Downey were going to lay out "the dimensions of the deal" and "listen for reactions." (Chesser Deposition, pages 63, 125). They wanted to get "indications" (Exhibit 302, page 1) that the Commissioners would approve synergy sharing and regulatory amortizations. Mr. Chesser "felt good" about the reaction of the Commissioners; he understood that Aquila CEO Richard Green did as well. (Chesser Deposition, page 127). After their meetings, Mr. Chesser

> testified that he and Mr. Green "had a general conversation that said that we both had a favorable impression from the meetings." (Chesser Deposition, page 139). Mr. Green went even farther: he said that Mr. Chesser reported back "similar support" from both Kansas and Missouri regulators. (Exhibit 203, page 1).
>
> ***
>
> In an email dated November 22, 2006 from Rick Green to the Aquila board, Mr. Green stated:
>
> Before signing a definitive agreement, [Great Plains] will seek informal indications from the Missouri Public Service Commission that they will be allowed to retain a "significant" portion of synergies as well as extend their Iatan II regulatory compact to Aquila's Iatan II interest…. (Exhibit 302, page 1).
>
> These discussions with regulators were so critically important that they share equal weight with the due diligence efforts:
>
> The result of the Phase II due diligence and discussions with regulators could result in one of three outcomes. We could confirm our original bid range and finalize a bid within that range, we could reduce or increase our original bid, or we could decide not to proceed with a final bid submission. (Exhibit 101, page 3).

**GPE, KCPL and Aquila's Response to OPC's Motion**

Great Plains Energy, Inc.("GPE"), Kansas City Power and Light Company ("KCPL") and Aquila, Inc. ("Aquila") (Collectively "Applicants") immediately observe that the executives of GPE testified under oath that they **"asked for no commitment and we received no commitment from either the Staff or the Commissioners."** (See Michael J. Chesser Deposition at 40. See also William H. Downey Deposition at 42). Applicants further note that the meetings occurred months before this proceeding was filed on April 4, 2007. Applicants, relying on direct quotes from the executives without extrapolation, observe:

> Michael J. Chesser, Chairman of the Board of Directors of Great Plains Energy, testified in his deposition that he advised Commissioners that "we were going to pursue the acquisition of Aquila." (See Chesser Dep. at 39).

Mr. Chesser was accompanied by William H. Downey, Chief Operating Officer of Great Plains Energy and President of KCPL, and Chris Giles, Vice President of Regulatory Affairs for KCPL. (Id. at 38).

Mr. Chesser stated that they informed the Commissioners about three primary "support mechanisms" for the transaction, which included a split of synergies for the first five years, with all additional savings thereafter going to the customer; the ability to recover actual interest costs in future rate case; and the use of an amortization mechanism in view of Aquila's investment requirements and the need to maintain Aquila's expected post-merger investment grade credit rating. (Id. at 39-40).

In his deposition Mr. Downey stated that the meetings with commissioners were at a "very high level … just simply there to talk more about the fact that we were going to do this." (See Downey Dep. at 41). He noted that "[w]e didn't hear any major objections to the overall concept," and the only feedback received from Commissioners was "[a]cknowledgment, appreciation for us coming in and briefing them ahead of time." (Id. at 42-43). "We didn't ask for anything, so we wouldn't have gotten a commitment." (Id. at 42). No documents were provided to Commissioners during the meetings. (Id. at 44. See also Chesser Dep. at 42).

During the bidding process Great Plains Energy was not able to implement a collaborative process with Commissioners and Staff as it did with its Comprehensive Energy Plan because of the highly sensitive nature of that process and its negotiations. (Tr. 150-51, 838-39, 875-77). However, after it was selected as the final bidder, Great Plains Energy and Aquila agreed that discussions with the regulators could take place. (Tr. 839, 875-77).

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Contrary to OPC's suggestion, the discussions with "regulators" were always meant to include both Commissioners and Staff.

"Q. You said that we met with regulators. Who was it that met with regulators?

A. I believe it was Bill Downey, myself and Chris Giles.

Q. When was that meeting, let's say with the Missouri commissioners? Or Missouri regulators?

A. I believe it was in mid January.

Q. And who was is that you met with specifically?

A. We met with I believe each of the commissioners and key members of the Missouri staff." (See Chesser Dep. at 38. See also Downey Dep. at 38).

Applicants further noted that: "Several of the documents cited by OPC were created early in this process and do refer to 'informal discussions with regulators.' See Ex. 101 (Dep. Ex. 26) at 3, T. Bassham Memorandum to Great Plains Energy Board of Directors (July 19, 2006); Ex. 121 (Dep. Ex. 5) at 3, M. Chesser Final Non- Binding Bid Letter to Lehman Brothers and Blackstone Group (Nov. 21, 2006)."

> As Mr. Chesser noted, that collaborative process did not occur, and instead simple courtesy visits were paid to the Commissioners. (Tr. 884). At the hearing, Mr. Chesser stated that the "primary purpose" was "to educate the commissioners about what was about to happen" with regard to the announcement of the merger. (See Tr. 842). He stated that while he "wanted to hear if there were any major objections that we were not aware of to this kind of a deal being considered," during the meetings "I heard nothing, we had no conversation around that." (Id.). He stated that Great Plains Energy officials did not communicate to the Commissioners that if they had a problem, they should let them know. (Id. at 843). "I expected if there was a problem, they would make that known to us." Id. at 844. While the Great Plains Energy officials did not hear anything "significantly negative," Mr. Chesser clarified that the "depth of discussion did not go to asking or receiving commitments." (Id. at 141). "We weren't looking for … specific feedback." (Id. at 146).
>
> Mr. Downey testified at the hearing as well, noting that "we were there to educate and to listen carefully to see if there were any reactions of a negative nature that we ought to take and keep in mind as we moved forward." (Tr. 911). The meetings were "typical," based upon Mr. Downey's 35-year experience in the industry at KCPL and at Commonwealth Edison Co. (Tr. 936-38). When "you're a regulated utility and you're about to embark on something that will have significant impact on the institution" and "ultimately involve the regulator," "you would let them know" your plans. (Tr. 977-78). Therefore, "we came over here to brief the Commissioners, and we intended in parallel to brief the Staff …." (Id. at 978).
>
> At his deposition Mr. Chesser emphasized: "We asked for no commitment and we received no commitment from either the Staff or the Commissioners." (See Chesser Dep. at 40). While Mr. Chesser advised that "we did not get a sense that there were any major objections," "we got into no details, no specifics, we got no commitments." (Id. at 38). He continued: "We got the sense that the devil is in the detail, but conceptually it was a good thing. And conceptually it would be better for

> Aquila to be acquired by a utility from within the state than a utility from outside the state. That is the sense that I got." (Id. at 38).
>
> Emphasizing that no commitment was sought or offered at the meetings with Commissioners, Mr. Chesser concluded "that they were going to look at the merits of the deal." (Tr. at 844).

**Analysis of Public Counsel's Motion**.

In order for OPC to succeed on its motion it must provide a sufficient factual basis to overcome the presumption that administrative decision-makers act honestly and impartially.[27] To establish actual bias on the part of the Commissioners, OPC must prove that the Commissioners have formulated an "unalterable prejudgment of the operative adjudicative facts of the case."[28] To establish an appearance of impropriety, OPC would have to prove that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioners would doubt the impartiality of the Commission.[29] Being "impartial" is defined as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair and just."[30]

At various points in OPC's motion it refers to the communications the Commissioners had with the company executives as being either *ex parte* or else some other form of communication. Black's Law Dictionary defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one

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[27] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[28] *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990).

[29] *State v. Kinder,* 942 S.W.2d 313, *321 (Mo. banc 1996).

[30] *Black's Law Dictionary*, 6th Edition, West Publishing Company, 1990, p. 752.

party only."[31] In order for a contact or action to be associated with one party, there must, obviously, be a "party" to an action, and there must be an action or case actually filed and pending, not speculatively looming in the distance. Any contact or communication with an individual, group or entity when there is no existing case, by definition, is not an *ex parte* contact.

Just to be clear, the communications between the Commissioners and the corporate executives that are the subject of OPC's Motion to Dismiss were not *ex parte* contacts. These communications occurred months before the merger case was filed, there was no adversarial or contested proceeding before the Commission at that time, and there were no parties to any action for which there could be a one-sided communication. Consequently, Commission Rule 4 CSR 240-4.020 does not apply to these communications and is, in fact, totally irrelevant to this discussion.[32]

The communications that occurred between the Commissioners and corporate executives were fully authorized and sanctioned by Missouri's General Assembly pursuant to Sections 386.210.1 and .2, RSMo Cum. Supp. 2006. Curiously, OPC implies the communications were somehow illicit without explaining how a statutorily authorized meeting violates any code of conduct, much less the statute authorizing that contact. Notably, the Judicial Canons upon which OPC so heavily relies provides an exception for communications that are expressly authorized by law,[33] and there is no

[31] *Black's Law Dictionary*, 6th Ed., West Publishing Company, 1990, p. 576.

[32] See 4 CSR 240-4.020(7).

[33] Supreme Court Rule 2.03, Canon 3(B)(7)(e).

question that these types of communications are expressly authorized by Sections 386.210.1 and .2.[34]

Public Counsel apparently asserts that the upbeat recitations concerning the tone of the meetings made by the corporate executives constitutes reliable and credible evidence of unlawful promises by the Commissioners. Each of these witnesses denied under oath that any Commissioner made any representation about the outcome of the merger application prior to the case being filed, or any time thereafter. Indeed, Mr. Chesser and Mr. Downey repetitively testified that they did not seek a prior commitment from the Commissioners, and none was offered by the Commissioners. In the record, it appears that OPC does not challenge the credibility of this testimony. OPC does not point to any prior inconsistent statements on the part of these witnesses. In short, OPC provides no evidence to contradict or diminish the substantial and credible evidence that during the statutorily authorized meetings the corporate officers who participated asked for no commitment and received no commitment from either the Commission's Staff or the Commissioners.

OPC does not provide even a single example of Commissioners Murray, Appling, and Clayton indicating by comment or conduct that she or he was biased or prejudiced in this case. OPC does not assert that any of these Commissioners has an improper interest in the case that would require recusal. OPC does not offer any factual evidence

[34] The Commission does not concede that the Judicial Canons would apply in this instance, however, even if they do apply, OPC fails to provide any evidence that the Canons were violated.

that any of these Commissioners were determined to reach a particular result regardless of the evidence.[35]

It would appear that OPC has taken the depositions, exhibits and testimony in this matter, cut them into small pieces and woven the words of its choosing together with the magic thread of innuendo in order to conclude that something clandestine and prejudicial must have occurred. In short, OPC offers no legitimate factual basis from evidence in the record to support a conclusion of actual bias or prejudgment on the part of the Commissioners.

Similarly, no reasonable person with total knowledge of the content of these conversations, the context surrounding the legislatively sanctioned conversations, and the timing of the conversations could conclude the Commissioners were biased or that there was even a remote appearance of impropriety. This is not an extreme case where disqualification is constitutionally required, and the Commissioners have an affirmative duty not to disqualify themselves unnecessarily.[36]

The Commission further notes that OPC's poorly worded and incorrect assertion (Paragraph 19) that utility companies have access to Commissioners not available to ratepayers and thus have undue influence over the Commission is a flat misrepresentation. Commissioners regularly speak with OPC or its employees, legislators, local government officials, the media, environmental advocates, advocates for low-income customers, representatives of industrial customers, and on occasion, individual residential ratepayers.

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[35] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).

[36] *Bates*, 922 S.W.2d at 431.

OPC finally asserts, without citation, that the rule of necessity would not require further consideration of the case. The case law demonstrates that OPC is wrong. The Missouri Court of Appeals has held:

> In those instances where the only forum authorized by statute would be unable to proceed, the Rule of Necessity could be invoked to permit a decision to be made by the adjudicating body in spite of its possible bias or self-interest. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980).[37]

In any event, the Rule of Necessity does not even come into play in this instance where none of the Commissioners that are the subject of OPC's Motion are required to recuse. There is a quorum of unbiased Commissioners, who have impeccably maintained their honesty, integrity and impartiality, prior to, and throughout this proceeding.

**Conclusion**

The Canons of Judicial Conduct and the Commission's Standard of Conduct Rules, are not, and were never intended to be, vehicles for third party control of an agency's agenda. The preamble to the Canons states: "Furthermore, the purpose of this Rule 2 would be subverted if it were invoked by lawyers for mere tactical advantage in a proceeding."[38] The purpose of Commission Rule 4 CSR 240-4.020 is to "insure that there is no question as to [the commission's] impartiality in reaching a decision on the whole record developed through open hearings." The purpose of these standards is not to allow attorneys, parties, corporate officers or their agents to arbitrarily obstruct the Commissioners' proper exercise of their quasi-judicial functions by initiating or

[37] *State ex rel. Powell v. Wallace*, 718 S.W.2d 545, 548 (Mo. App. 1986); accord, *Stonecipher v. Poplar Bluff R-1 School District*, 205 S.W.3d 325, 328 (Mo. App. 2006); *Fitzgerald*, 796 S.W.2d at 59-61. See also, *Central Missouri Plumbing Co. v. Plumbers Union Local 35*, 908 S.W.2d 366, 369-371 (Mo. App. 1995).

[38] Supreme Court Rule 2.01, Preamble.

entertaining statutorily authorized communications about matters concerning regulatory policy.

As noted above, OPC cites no comment or conduct by Commissioners Murray, Appling, and Clayton that would serve as a basis for recusal, nor is there evidence that the Commission has done anything to diminish public confidence in its work. Lacking any merit to its claims, it appears OPC is attempting to gain an improper tactical advantage by the inappropriate use of the Standard of Conduct Rules. Such action may actually serve more to erode the credibility of OPC before objective commentators and in the eyes of the public, which it is responsible to serve.

The General Assembly has astutely and comprehensively defined permitted communications with the Commission, balancing the Commission's and the public's need to inform themselves with parties' needs for an impartial adjudicator.[39] The Commission and its Commissioners have without question observed the requirements of this law.

**IT IS ORDERED THAT:**

1. The Office of the Public Counsel's December 13, 2007, Motion to Dismiss is denied as being meritless.

[39] Moreover the General Assembly has provided the additional safeguard of judicial review of all of the Commission's decisions. Section 386.510, and 386.540, RSMo 2000.

2. This order shall become effective on January 2, 2008.

**BY THE COMMISSION**

Colleen M. Dale
Secretary

( S E A L )

Davis, Chm., abstains
Murray, Clayton, Appling, and
Jarrett, CC., concur.
Clayton, separate concurrence to follow

Stearley, Regulatory Law Judge

EXHIBIT 8

# BEFORE THE PUBLIC SERVICE COMMISSION
# OF THE STATE OF MISSOURI

| | | |
|---|---|---|
| In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief. | ) ) ) ) ) ) | **Case No. EM-2007-0374** |

## COMMISSIONER CLAYTON'S OPINION AND RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

This Commissioner concurs in the Order Denying Motion To Dismiss filed by the majority and further wishes to respond to allegations made by the Office of Public Counsel (OPC) in his motion. Serious allegations have been lodged against the Commission and its members suggesting the occurrence of allegedly improper or illegal activity. This Commissioner supports the Order Denying Motion To Dismiss because it is based solidly in law, and the facts presented at hearing, thus far, suggest no wrongdoing on the part of three of the four Commissioners still in the case. This Commissioner must also respond directly to Public Counsel's assertions to assure the public of this Commissioner's impartiality, his lack of bias and his commitment to deciding every case fairly on the established record.

First and foremost, this Commissioner welcomes the scrutiny and attention given by the public, the press and the attorneys practicing before the Commission. The decisions rendered by this agency directly affect nearly all Missourians in the form of utility rates, environmental impact, economic development, and in citizens' basic health and welfare through safe and reliable utility service. Commission activities and decisions rarely receive wide-spread attention in the media and local public hearings held by the Commission attract a discouragingly small

number of citizens to participate in a complex and serpentine administrative law process. Recently-enacted legislative changes, including statutes directly at issue in this case, have also gone relatively unnoticed as have legislative changes that have altered traditional methods of rate making with new surcharges for electric, water and gas utilities. Any opportunity to educate the public about the Commission is critically important.

In this case, OPC has challenged the impartiality of four Commissioners serving on the Commission. In support of his Motion To Dismiss, OPC cites the alleged occurrence of a day of meetings in which officials from Aquila and Great Plains appeared in Jefferson City to brief Commissioners on the potential for a future transaction involving the two utilities. OPC has alleged that these meetings were critically important for determining if and how the utilities would proceed based on reactions from Commissioners during the meetings. OPC has cited a number of exhibits and deposition testimony that refer to informal discussions with regulators in Kansas and Missouri prior to the transaction agreements being executed. OPC suggests that the lack of objection raised by Commissioners or the tacit approval of the various rate making methodologies taint the pending process sufficiently to warrant dismissal.

Prior to the filing of his motion, OPC suggested on the record, in response to a letter from the Missouri Attorney General, that he would seek dismissal of the case because of allegedly improper conduct committed by Chairman Davis and Commissioners Murray, Appling and Clayton.[1] The pending motion before the Commission has specific application to three of the four Commissioners who remain in the case, including Commissioners Murray, Appling and Clayton.[2] Chairman Davis is no longer subject to the pending motion because he recused himself from the case on December 6, 2007. Because of that recusal, this Opinion will focus

[1] Tr. at 993-995.

entirely on the allegations made against the three named Commissioners and does not address the merits of the allegations made against Chairman Davis. The evidence supporting allegations unique to Chairman Davis, including a number of e mails filed as exhibits, is irrelevant to the analysis associated with the three remaining Commissioners.[3]

There are no specific references to Commissioners Murray, Appling or Clayton in any of the testimony, the depositions, written documents or exhibits. These Commissioners are never mentioned by name anywhere in the evidence. There is no written account of any of the meetings with these Commissioners. There is no evidence that any of these Commissioners made any specific commitment or even expressed any opinion. No documents were given to the Commissioners. There is no evidence of partiality in favor of the transaction or any evidence of prejudgment on the part of the three Commissioners at issue. There is no record that either of the corporate boards were ever advised of the three Commissioners' positions and the record does not reflect any commitment for a time table for concluding this case by the three Commissioners. The totality of the evidence suggests a vague discussion, if any actually occurred.

It is important to review the record and identify the actual allegations lodged against these Commissioners. First of all, the record reflects that these Commissioners never met with Richard Green, the CEO of Aquila, and his e mails entered into evidence are devoid of any reference to any meeting with Commissioners Murray, Appling or Clayton.[4] They do not describe any meeting and, further, they do not outline any commitment, prejudgment or commentary on the positions of Commissioners Murray, Appling or Clayton.

In addition, the evidence of meetings among the Commissioners and Great Plains

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[2] Any reference to the language "these Commissioners" shall mean Commissioners Murray, Appling and Clayton, who are the remaining Commissioners in the case, subject to allegations of improper communications.
[3] *See* Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App.1979).
[4] Exhibits 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 51.

officials is vague and without detail. There are no Great Plains documents reflecting the nature or detail of any meetings with Commissioners. The only reference to any particular Commissioner in writing attributed to Great Plains comes second-hand in Deposition exhibit 18 and that Commissioner is no longer in the case. Great Plains refers to Commissioners as Missouri regulators and on several occasions confuses whether regulators includes Commissioners, Commission staff or both.[5]

OPC argues that Great Plains was required to get some sort of informal approval prior to the filing of the case and that any meetings held were designed to elicit feedback prior to closing the deal. Although OPC argues that these meetings were critically important for Great Plains, the evidence suggests that Great Plains officials cannot even remember the day of the meetings. Despite four days of testimony and the filing of multiple exhibits, documents and data requests, it is still unclear when these meetings took place. One reference to the record suggests that no meetings ever occurred,[6] another reference suggests a meeting date of Monday, January 8, 2007,[7] another reference is to January 17th [8] and yet another reference is to January 24th.[9] Great Plains continues to struggle with certainty in filing its response to OPC's motion by arguing that the meetings occurred either on January 17th or January 24th.[10] In response to the Commission's request for more certainty of dates, Great Plains estimated that "to the best of its knowledge," the meetings occurred on January 17th.[11]

Contrary to Great Plain's assertions that its staff met with "all of the Commissioners,"[12] this Commissioner has no recollection of ever meeting with any utility official regarding the

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[5] Tr. at 839-841.
[6] Exhibit 107.
[7] Tr. at 842.
[8] Tr. at 876; Exhibit 106.
[9] Exhibits 104HC, 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 859-860.
[10] Applicant's Opposition to Motion To Dismiss dated December 26, 2007.
[11] Applicant's Response to Order Directing Filing dated December 28, 2007.

merger transaction. This Commissioner has no record of any such meeting taking place on either date. This Commissioner has no memory of the various rate making provisions that allegedly support the transaction, including granting an acquisition premium in rates, authorizing enhanced regulatory amortizations or pre-authorizing a sharing of suggested synergy savings associated with the transaction. This Commissioner's first recollection of any merger discussion was receiving the press release issued by the companies and the notice to Wall Street investors, which included a webcast of utility officials.

This Commissioner believes that the Great Plains officials may be mistaken that they met with each of the Commissioners and their vague references to the meeting dates supports that possible mistake. Piecing together the evidence, it appears that Aquila CEO, Richard Green, and Great Plains CEO, Michael Chesser, split up responsibilities in meeting with Kansas and Missouri regulators.[13] Green had the obligation of meeting with the Chairman and several staff members.[14] Great Plains CEO, Mike Chesser, and his staff agreed supposedly to meet with all the other Commissioners.[15] The division of duties occurred on or about Tuesday, January 23, 2007, in a meeting between Mr. Chesser and Mr. Green and recounted in an e mail also dated January 23, 2007.

> During the meeting, Mike [Chesser] and I came to agreement on the general logistics of "announcement day" as well as how we are going to meet with the Missouri and Kansas regulators. To start, we agreed I would call Chairman Jeff Davis, Wes Henderson (leader of the Missouri Commission Staff) and Bob Schallenberg (leader of the Missouri Commission Accounting Staff) and alert each that Mike and then I want to meet with them to discuss a potential combination of our two companies. I will do the same

[12] Tr. at 860.
[13] Exhibit 119HC; Dep. Exhibit 18.
[14] *Id.*
[15] *Id.*

> thing with Chairman Brian Moline of the Kansas Corporation Commission and Don Lowe (leader of the Kansas Corporation Commission Staff). The face to face meetings could happen as early as this week.
>
> I did speak with Chairman Davis this morning. He said he would make time to take the meetings. We have also scheduled a call tomorrow morning at 9 a.m. with Wes Henderson and Bob Schallenberg to set a date to brief them.[16]

The implication from the first paragraph quoted above is that no contacts had been made as of Tuesday, January 23, 2007. The e mail suggests that these were the first arrangements at contacting anyone from the Missouri Commission—Commissioners or staff. It is not logical that the other Commissioners would have been briefed on January 17th, a week prior to the meeting with the Chairman.

Another e mail dated Thursday, January 25, 2007, recounted in detail that Mr. Green held a relatively unsuccessful meeting by phone with several staff members and then held a meeting with the Chairman.[17] A follow up breakfast meeting between Green and Chesser was scheduled on Monday, January 29, 2007, to further discuss their progress.

Finally, the third e mail from Mr. Green is dated Wednesday, January 31, 2007. He refers to his contacts in Kansas and to contacts with the Missouri Chairman. Mr. Green also refers to his follow up conversations with Mr. Chesser, possibly from the breakfast meeting of Monday, January 29th referenced in the second e mail, in which he recounted details of Mr. Chesser's meetings. This e mail reflects, second-hand through Mr. Green, that Mr. Chesser held meetings in Kansas and Missouri. Speaking of Mr. Chesser to the Aquila Board, Mr. Green writes that, "I also had another meeting with Mike Chesser. He confirmed that [Great Plains] received the same mixed signals in Jefferson City." Mr. Green then explained Mr. Chesser's

[16] Exhibit 119HC.

concerns with the Commission staff and their supposed lack of support for their plan. Commissioners Murray, Appling and Clayton are neither referenced individually nor are their reactions to the merger plan.[18]

Lastly, additional confirmation of the meeting date may be found in another document admitted into evidence. The document is a power point presentation by Great Plains management to the Board dated February 1, 2007. On page 3 of the presentation, entitled "Process Update," the author lists a number of items that had been completed or were pending. The second bullet point reads, "Giant (Great Plains) management met with KS & MO regulators on January 24th."[19] There is a conflict in the evidence on the date on which any Commissioner meetings were held.

Consequently, if the meetings occurred January 24th, it is impossible that this Commissioner participated. This Commissioner was out of the country during part of the week of January 22nd, including January 24th. It would have been a physical impossibility for this Commissioner to have participated in any meeting on that day. Alternatively, if the meeting took place on January 17th, this Commissioner could have participated, although there is no record of any meeting and this Commissioner has no recollection of the meeting.

Regardless, even if the 10 – 15 minute meetings had taken place, there is absolutely no evidence of wrongdoing or inappropriate conduct on the part of these Commissioners. As the majority Order reflects, since 2003 and the passage of SS SCS HB 208, these meetings have been specifically authorized and approved by the Missouri General Assembly. This Commissioner was appointed in 2003 and has served under the current regulatory or legal framework for nearly his entire term, which specifically authorizes such communications.

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[17] Deposition Exhibit 18.
[18] Exhibit 304.

The majority Order correctly cites the applicable law with regard to communications among parties and Commissioners. Section 386.210 clearly and unambiguously authorizes the meetings that may or may not have occurred between the three remaining Commissioners. Section 1 reads that,

> The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official agency or instrumentality thereof, on any matter relating to the performance of its duties.

The statute offers further guidance in section 2 which reads,

> 2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission. (emphasis added)[20]

OPC and Interveners completely ignore this section in their pleadings. Since the case was not filed until April and was not pending during the alleged meetings, the communication cannot be considered improper. Absent some additional evidence suggesting partiality or bias, OPC's motion must fail.

Whether this activity is appropriate or not is another question. The public deserves to have confidence in those who hold the public trust and this case suggests that such meetings, while legally and statutorily authorized, may lead to cynicism and a significant lack of confidence in Commission business. This is at a time when the Commission cannot afford to lose credibility. Utility issues have moved to the forefront in terms of the regular filing of rate cases, recurrent power outages suggesting a need for new reliability standards, higher fuel costs, the implications from Washington on climate policy as well as other controversies at the

[19] Exhibit 104HC.

Commission. The presence of these issues is causing the public to carefully watch the business of the Commission and the conduct of the Commissioners.

This Commissioner welcomes the public dialogue regarding Commission ethics and practice which may include a discussion on proposals for a new rule making, proposals to amend state statute or inquiries by the Missouri Senate. This Commissioner notes that any potential revisions to Commission practice or procedure should be to encourage more public disclosure of communications among all parties and Commissioners. However, several proposals solely address communications among utilities and Commissioners and do not make similar demands on interveners, the staff of the Commission or OPC, who may also communicate with Commissioners. Since the Commission is a tribunal expected to fairly balance the interests of all the parties in rendering a decision in a case, all parties should be equally treated with regard to all communications and dealings with Commissioners. It is disingenuous for movants to demand more disclosure of utility contacts while not suggesting similar treatment for themselves.[21] This disclosure must also balance the need for Commissioners to be knowledgeable about utility issues without compromising the due process of potential adverse parties in cases.

This Commissioner has a record that is free from partiality reflecting independence in decisions. This Commissioner intends to decide this case, as in all other cases, based on the record before the Commission. Many questions need to be asked and answered by the parties and the witnesses. Only after thoughtful study of the record and a full evaluation of the impact on the public and the parties can a decision be made. That is how the process is supposed to work. This Commissioner intends to see this case through to its conclusion in the manner required by statute, rule and canon.

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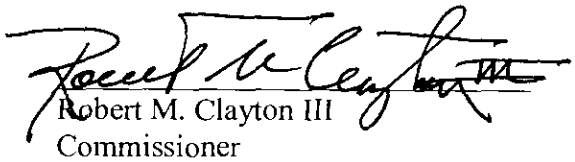
[20] §386.210, RSMo. Supp. 2007.
[21] *See* Case Number AX-2008-0201.

For the foregoing reasons, this Commissioner concurs.

Respectfully submitted,



Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 2nd day of January 2008.

# Before the
# Missouri Public Service Commission

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|---|---|---|
| **In the Matter of a Review of the Missouri Public Service Commission=s Standard of Conduct Rules and Conflicts of Interest Policies** | **)** **)** **)** | **Case No. AO-2008-0192** |

## Comments of Scott Hempling, Esq.
## Executive Director
## National Regulatory Research Institute[1]

## Introduction

I am Scott Hempling, Executive Director of the National Regulatory Research Institute. NRRI is an independent, nonprofit corporation funded primarily through voluntary dues contributed by state public service commissions. Its mission is to provide the research services state utility commissions need to make regulatory decisions of the highest possible quality.

Chairman Davis has asked me to initiate today's discussion. A few caveats first. My thoughts are my own, not NRRI's nor or any state commission's. I acknowledge having a history with the Missouri Commission, for whom I was outside counsel for federal electricity matters from about 1992 to 2006. I've discussed some of my thoughts with Chairman Davis, but neither he nor any other Missouri Commissioner has confined, guided or influenced my comments. As you will see, I allocate responsibility for the present difficulties on an equal opportunity basis.

I have no specific knowledge of the pending merger. I have not reviewed any of the filings, other than those involving the motion to dismiss the merger application. My thoughts today are informed by your procedural debate, but they are not specific to Missouri or to mergers.

I have been on all sides of the decisionmaking process: litigant, commission advisor, brief-writer and opinion-writer. So I have had to live, often uncomfortably, with all manner of procedural practices. I wish to focus this morning on how we can modify these practices to help regulators do their jobs the best they can. I will ask three questions:

1. What procedural principles best serve regulation’s purposes?

2. Can informality co-exist with objectivity?

3. Is there a trust problem here?

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## I. What Procedural Principles Best Serve Regulation's Purposes?

Economic regulation seeks to align private behavior with the public interest. For today's regulators, the public interest is becoming difficult to discern: New interest groups, accelerated technological change, higher customer expectations, lower investor patience, and growing instability in corporate and market structures, are combining to blur regulatory vision.

Enlarging the problem is the uncertain stature of state commissions. Underfunded and understaffed relative to their responsibilities, they also face a common political dichotomy: citizens support regulation when it protects, but reject regulation when it obstructs.

To preserve its political effectiveness, regulation cannot ignore these pressures. But to preserve its professionalism, regulation cannot succumb to them. Otherwise regulation becomes mere conflict resolution rather than public interest promotion. For the public interest to prevail, regulators have to gather facts, and create opportunities for objective analysis.

So, what procedures best carry out these purposes? I have two main thoughts.

### A. Shift the focus from the parties' interests to the regulatory interest

The present debate seems focused on parties' behavior: What does the law permit and prohibit parties to say and do? Who said what to whom, when and under what circumstances? Rules on party behavior, like rules in athletic contests, are indispensable because they define boundaries and thus build trust in the outcomes.

Unlike athletic contests, however, regulation is not a forum in which private interests get an opportunity to win; it is a forum in which government officials carry out their obligation to align private behavior with public interest.

I suggest, therefore, that we focus more on what regulators need to do their duty.

**1. Regulators need full information and objective analysis.** Regulators, like all people, gather and absorb information in different ways: Some by listening, some by talking, some by writing, some by reading, some by all of the above. Some learn by causing opposing views to confront each other publicly; others learn by sitting in a room quietly, meeting with one person at a time. Some like to hear from the parties first, then study objective materials. Others prefer to study objective materials first; thus educated, they then turn to the parties. The regulator needs to find the right person to talk to, at the right time. The right person is not necessarily party's designated witness.

**2. Regulators are forced to learn on the job.** They are rarely as well educated, in terms of utility regulation, as the professionals coming to meet them. That differential creates opportunities for exploitation. A party who takes advantage of that differential -- by telling only half the story, by omitting contrary arguments, by shading the facts, by oversimplification-through-powerpoint -- contributes to the degradation of the forum and the process. She is being

penny wise and pound foolish. In the long run no one benefits from a forum that makes decisions based on self-interest arguments.

### B. Find the right mix of formality and informality

**Benefits of informality:** The author Russell Baker wrote: "An educated person is one who has learned that information almost always turns out to be at best incomplete and very often false, misleading, fictitious, mendacious - just dead wrong." The key to becoming educated is to ask the uneducated question. The great explorers, from Galileo to Edison to Watson and Crick, made their discoveries by asking ignorant questions. So do inexperienced regulators. But they'd rather ask their ignorant questions in private.

**Risks of informality** include unequal access, arising from and exacerbating asymmetry of resources; secret deals; incomplete information; subjective information; misleading information.

**Benefits of formality** include clarity of the evidentiary rules, boundaries on what goes into the record, discipline of cross examination, higher level of expertise, public trust.

**Problems with formality:** In a strictly formal setting, the parties have great influence over what the commissioners hear, how they hear it, when they hear it, from whom they hear it. Putting on a case for a private client is stagecraft -- an exercise in persuasion that easily becomes manipulation.

You might say, "But the adversarial system produces truth." That maxim, with origins in the judicial context, is overstated in the regulatory context. In regulation the purpose is not to choose between private party positions, but to advance the public interest. Regulators are not judges; they are policymakers. Sometimes they use adjudication as a procedure to make policy but they make policy for all residents. In an adversarial focus, the focus is on the adversaries. In regulation, the focus must be on the public.

## II. Can Informality Co-Exist with Objectivity?

Underlying the legal prohibitions against ex parte contacts and prejudgment is a goal of objectivity. Are there ways to preserve objectivity while allowing informality?

### A. Informal, pre-filing conversations -- if handled carefully -- serve useful purposes.

In informal conversations, questions get asked; precision is sought. Here are six simple suggestions to preserve the positives while diminishing the negatives.

**1. The purpose should not be to read tea leaves.** The Commissioners are barred from expressing an opinion; so seeking an opinion is an invitation to violate the integrity of the process. A party committed to the integrity of the process will not invite a Commissioner to violate it.

**2. The purpose should be two-fold: to pay the courtesy of advance notice, and to see what questions or concerns a Commission might have.** Why the courtesy of advance notice? So the Commissioners can begin their preparation. They can seek objective reading material, assign assistants to draft briefing papers, determine the necessary staffing, start the process of retaining consultants.

Eliciting Commissioner questions and concerns allows parties to focus their submissions on the public interest. Provided a Commissioner makes clear she has no fixed position, where is the prejudgment or impropriety with a Commissioner making the following statements?

a. "Assertions of merger benefits that go beyond three years make me uneasy because it becomes hard to predict what a utility's cost structure would have been absent the merger."

b. "The last time Witness X appeared on the stand, he lost some credibility with me because he testified that absent a 13% ROE, the company would be crippled; yet one week later the company settled on a 11.8% ROE and the company seems to be doing fine."

c. "If you file a merger application, I hope you will provide evidence on whether the return on the customer's dollar, in terms of cost reductions flowing from the acquisition premium cost you expect customers to pay for, at least matches the return the company could earn on alternative investments of comparable risk."

d. "The way you describe your proposal, it seems to me you are asking the ratepayers to take definite risks in return for receiving indefinite benefits. There seems to be an asymmetry here but I am not sure. I hope your application and testimony and briefs will address this issue with precision."

e. "Put on whatever witness you want, but I find it difficult to credit testimony from CEOs when they speak in platitudes."

f. "I'd like to see more witnesses at lower levels in the hierarchy -- the ones who actually make the utility run."

**3. Commissioners should ask questions but express no final opinions.** Probing questions should not be confused with negative conclusions. When two retail monopolies propose to merge, it is reasonable to probe.

**4. If the party uses written materials, they should become public within 24 hours.**

**5. The Commissioner should place notice of the meeting on the public record.**

**6. Others should have opportunities to discuss the same issues with the same Commissioners.**

Implementation of these six ideas seems to be to remove any basis for taint, while preserving the flexibility necessary for clearheaded information-gathering.

### B. There is a tendency to confuse unequal access with improper access

Indisputable fact: The major utilities have more regulatory affairs resources than do the intervenors.

A Commission can say to the utility: I want to talk to your load forecasting person to understand the methodologies used to predict industrial load for 2010. The utility can make this person available in 24 hours at no incremental cost (the base costs being covered by rates). The consumer advocate cannot make comparable resources available to the Commission.

This asymmetry of access creates opportunities to take advantage. Even a straight, objective presentation creates an advantage: a bond, a reputation for responsiveness, a dependency. That is why people seek face time with Commissioners. The people not present, those with fewer access resources, lack those opportunities and advantages. This asymmetry of access is exacerbated by irony: irony that the asymmetry is funded in part by ratepayers because regulatory relations is a cost of doing business recoverable in rates.

But: unequal access is not improper access. The solution is not to limit access, but to expand it by creating comparable resource bases for the customer side. I see no reason why regulated utilities would not support legislation which grants to the OPC a level of ratepayer-funded regulatory resources bearing some reasonable relation to the utilities' ratepayer-funded resources. That is not the present case. Why not?

### C. A few words on prejudgment

We should take care to distinguish bias from hunch. A bias is an inability or unwillingness to examine all facts and reason objectively. A hunch is tentative conclusion, based on education and experience, that a particular set of propositions is more likely to be true than false; and that if true, requires a particular outcome. No one wants a bench saying "my mind is a complete blank." The regulatory mind is not blank; it is full of experiences, prior readings, stray facts both diligently and casually acquired and evaluated. Those stray facts lead to hunches. Hunches are unavoidable and they are useful -- as long as the regulator establishes a

systematic, objective method for testing them. And the expression of a hunch, in public or private, is not prejudgment. Expressing a hunch gets a reaction; and commissioners can learn from the reaction. Let's avoid dampening the thought process in the name of unachieavable procedural purity.

### D. A few words on appearance of impartiality

The law is clear: the mere fact of a meeting, not ex parte, does not signal partiality. Nor does a flurry of post-meeting emails from the non-Commissioner attendees, about how positive the meeting was.

It is human nature to deceive oneself about a meeting's outcome. I've lost track of the number of lawyers, including me, who left their oral arguments thinking they'd won because the bench was friendlier to their side.

It would help if meeting participants characterized their meetings more cautiously. Rather than saying things like "the Commissioner reacted positively," try this: "He asked a lot of questions. More questions than I expected; more questions than I wanted, but good questions. We'd better get to work on the answers."

## III. Is There a Trust Problem Here?

The parties have framed their dispute in the language of procedural law. But I wonder if the underlying problem is one of trust. Consider three examples:[2]

1. If one employee says the meeting's purpose was merely courtesy and education, while his boss says its purpose was to gauge the Commissioners' reactions before he signed a multibillion contract, trust diminishes.

2. If a party seeks Commissioner disqualifications, through a motion that (i) ascribes to the Commissioners no act other than attending a lawful meeting, (ii) asserts "appearance of impropriety" on the sole basis that a non-Commissioner participant later characterized the Commissioners' views as favorable, (iii) cites no case supporting the argument that a lawful meeting becomes unlawful solely because a non-Commissioner participant writes hearsay about a Commissioner's position, and (iv) offers no independent evidence of Commissioner prejudgment, trust diminishes.

[2] These are hypothetical examples only. Any resemblance to the real world is completely coincidental.

3. When after 20 years of continuous merger proposals, there remains in the regulatory community no clear principles on how to measure, compare and allocate merger costs and benefits, trust diminishes.

Distrust breeds rigidity, but regulation requires flexibility. I hope you can find your way to restoring trust. We have a ways to go. I wonder if one place to start is to focus on our common goal – high quality regulation.

I've personally worked with and known hundreds of Commissioners, in this state and in about 30 others. Commissioners are, mostly, diligent, unbiased, committed to good faith practices and behaviors. They are also, mostly, inexperienced at regulation, and painfully aware of their inexperience. Their mistakes -- especially procedural ones -- are often mistakes of inexperience.

What is the regulatory community doing to solve this problem? The disparity in resources, pay scale, and professional preparation is indisputable. Do the stakeholders approach the Legislature and argue, as allies, for the resources needed by the Commission and the Public Counsel? Do they work cooperatively to fashion a state-specific curriculum for new regulators? Or do they behave as if the status quo -- well-meaning, but under-educated regulators, dependent on pre-filing meetings for education -- is a good thing? Do we understand regulation as a comprehensive, coherent system designed to ensure accountability to the public? Or do we view it as a process we game for temporary advantage? Is your debate here really about administrative procedure, or is it about your commitment to high-quality utility regulation?

## Conclusion

In an appeal of a Federal Power Commission decision, the U.S. Court of Appeals for Second Circuit wrote:

> "... [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

*Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom., Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

If we can design administrative procedures that recognize that the Commission's powers are broader than declaring winners and losers, we have a shot at giving the public the "active and affirmative protection" it deserves.

Thank you for the opportunity to speak today.

H
Petrowskiv. NorwichFreeAcademy
Conn., 1986.

Supreme Court of Connecticut.
'Mary PETROWSKI
v.
NORWICH FREE ACADEMY et al.
Argued Dec. 10, 1985,
Decided March 18, 1986.

Board of trustees of privately endowed high school unanimously voted to terminate tenured teacher's contract of employment and teacher appealed. The Superior Court, Judicial District of New London, Edelberg, J., affirmed the dismissal and teacher appealed. The Appellate Court, Dupont, J., 2 Conn.App. 551, 481 A.2d 1096, reversed and school board appealed. The Supreme Court, Shea, J., held that: (1) due process standards governing disqualification of administrative adjudicators were not as high as principles governing judicial disqualification, and (2) membership of two members of eight-person school board of trustees in law firm which represented school in matters unrelated to teacher's termination did not constitute conflicting interest sufficient to disqualify trustees from participating in termination hearing under either federal or state law.

Judgment of Appellate Court reversed.
West Headnotes
[1] Schools 345 C=147.31

345 Schools
34511 Public Schools
3451I(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.31 k. In General. Most Cited Cases
(Formerly 345k147.30, 345k141(5))
When school board considers terminating teacher's contract it is acting in quasi-judicial capacity.

[2] Constitutional Law 92 0: 4201

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4196 Employment Relationships
92k4201 k. Tenure. Most Cited Cases
(Formerly 92k277(2))

Schools 345 €=133.6(5)

345 Schools
34511 Public Schools
34511(K) Teachers
34511(K)1 In General
345k133.6 Permanent Tenure
345k133.6(2) Constitutional and Statutory Provisions
345k133.6(5) k. Construction and Operation in General. Most Cited Cases
(Formerly 345k133.9)
Tenured teacher has right to continued employment except upon showing of cause for termination or bona fide elimination of teaching position; that right is property right protected under due process clause of Fourteenth Amendment to United States Constitution. C.G.S.A. § 10-151(b); U.S.C.A. Const.Amend. 14.

[3] Administrative Law and Procedure 15A€=' 314

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak314 k. Bias, Prejudice or Other Disqualification to Exercise Powers. Most Cited Cases
Presumption that administrators serving as adjudicators are unbiased can be rebutted by

showing of conflict of interest but burden of establishing disqualifying interest rests on party making contention and impermissible interest asserted must be realistic and more than remote.

[4] Constitutional Law 92 4[illegible]

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))
Applicable due process standards for disqualification of administrative adjudicators do not rise to heights of those prescribed for judicial disqualification.

[5] Constitutional Law 92 ( ²4202

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4196 Employment Relationships
92k4202 k. Notice and Hearing; Proceedings and Review. Most Cited Cases
(Formerly 92k278.5(4))
Membership of two of private school's board of trustees members in law firm that represented school on matters unrelated to teacher termination was too remote and tenuous in connection to require, under due process principles, their disqualification from termination hearing in that there was no evidence that either trustee had " direct, personal, or pecuniary interest" in termination of teacher and, because they were only two members of an eight-person board of trustees, they lacked sufficient "official motive" to render proceeding constitutionally infirm. U.S.C.A. Const.Amend. 14.

[6] Schools 345 e=14731

345 Schools
34511 Public Schools
345II(K) Teachers
34511(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.31 k. In General. Most Cited Cases
(Formerly 345k147.30, 345k141(5))
Two members of eight-person private school board of trustees who were also members in law firm that represented school on matters unrelated to teacher's termination did not have sufficient conflict of interest to require their disqualification as administrative adjudicators at teacher's termination hearing. C.G.S.A. §§ 8-11, 8-21, 10-151(6).

**139 *231 Wesley W. Horton, with whom were Richard D. O'Connor and Susan M. Cormier, Hartford, for appellants (defendants).
Marvin M. Horwitz, Norwich, for appellee (plaintiff).

**140 Before PETERS, C.J., and HEALEY, SHEA, SANTANIELLO and CALLAHAN, JJ.
*232 SHEA, Associate Justice.
This is an appeal, after certification, from a judgment of the Appellate Court reversing a decision of the Superior Court, which had dismissed the plaintiffs appeal from the termination of her employment contract by the board of trustees of the Norwich Free Academy. We granted certification to review the judgment of the Appellate Court that the failure of two members of the board to disqualify themselves in the determination of the plaintiffs case, because of their inherent conflicts of interests, violated federal constitutional due process principles. We reverse the judgment of the Appellate Court.

The decision of the Appellate Court fully describes the underlying facts and procedural history. *Petrowskiv. NorwichFreeAcademy*, 2 Conn.App. 551, 481 A.2d 1096 (1984); see Siegal, "Labor Relations and Employment Law Developments in Connecticut in 1984," 59 Conn.B.J. 141, 144-45 (1985). The plaintiff, a tenured teacher at Norwich Free Academy, upon receiving written notice that the termination of her contract was under consideration, requested a hearing before the board of trustees of the high school pursuant to General Statutes (Rev. to 1983) § 10-151(b).[FN1] During

that hearing, she sought to have two members of the board, Wayne G. Tillinghast and James J. Dutton, disqualify themselves on the basis of their membership in a law firm that represented the academy in other unrelated legal matters. They refused to disqualify themselves and continued to participate in the proceedings. The *233 board unanimously voted to terminate the plaintiffs employment contract. The plaintiff appealed to the Superior Court challenging the participation of the two attorneys. That court found that neither Tillinghast nor Dutton was prejudiced against the plaintiff, and that the personal interests of both in the outcome of the proceedings were too nebulous and remote to have mandated their disqualification. The court rendered judgment in favor of the defendants and dismissed the plaintiffs appeal. Thereafter, the plaintiff appealed to the Appellate Court.

FN1. The Norwich Free Academy is a privately endowed secondary school which exists by virtue of a corporate charter granted by the General Assembly in 1854. 3 Resolutions and Private Acts, pp. 259-60. For purposes of General Statutes (Rev. to 1983) § 10-151 (b) which details the procedure for termination of a tenured teacher's employment contract, the board of trustees of an endowed high school, such as Norwich Free Academy, has the same status as a board of education of a public high school. See General Statutes § 10-34. Public Acts 1983, No. 83-398, changed § 10-151 (b) to § 10-151 (d).

The Appellate Court reversed the Superior Court's decision, concluding that the presence of Tillinghast and Dutton on the board of trustees *per se* violated the plaintiffs federal due process rights because it created an appearance of impropriety. The court reached its decision by equating the due process test for disqualification of an administrative adjudicator with the standard for judicial disqualification. " When administrators act in a quasi-judicial capacity, as the board in this case did, their functions and that of judges most closely merge and the judicial model to test impropriety becomes an acceptable one." *Petrowskiv. NorwichFree Academy,* supra, 560, 481 A.2d 1096.

The defendants' request to this court for certification raised a single question: Is the federal due process test for disqualification of an administrative official acting in a quasi-judicial capacity the same as the test for the disqualification of a judge? The plaintiff filed a preliminary statement of issues under Practice Book § 3012(a), in order to provide an alternative basis for affirming the Appellate Court's decision. The relevant issue, broader in scope than that before us on certification, is: "Did the defendants violate the plaintiffs right to due process under Connecticut General Statutes [Rev. to 1983] § 10-151 and the **141 Fourteenth *234 Amendment to the United States Constitution when trustees Dutton and Tillinghast participated in the hearing and decision, although they were disqualified?" FN2

FN2. In their petition for certification the defendants also claimed error in the Appellate Court's rescript which set aside the Superior Court's judgment and remanded the case with direction to reverse the decision of the board of trustees. Although the plaintiff conceded error in her brief and at argument, we need not address this claim in light of our disposition of the first issue.

In this appeal the focus of our review is not the judgment of the Superior Court but of the Appellate Court. We do not hear the appeal de novo. The only questions we need consider are those squarely raised by the petition for certification and the appellee's preliminary statement of issues, and we will ordinarily consider these issues in the form in which they have been framed in the Appellate Court. See Practice Book §§ 3012(a), 3154; *State v. Beckenbach,* 198 Conn 43, 47, 501 A.2d 752 (1985); *State v. Torrence,* 196 Conn. 430, 433, 493 A.2d 865 (1985).

[1][2] When a school board considers terminating a teacher's contract it is acting in a quasi-judicial capacity. *Catino v. Board of Education,* 174 Conn.

414, 417, 389 A.2d 754 (1978). Under our statutes, a tenured teacher has a right to continued employment except upon a showing of cause for termination or a bona fide elimination of the teaching position. General Statutes (Rev. to 1983) § 10-151(b). Such a right is a property right protected under the due process clause of the fourteenth amendment to the United States constitution. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Lee v. Board of Education,* 181 Conn. 69, 72, 434 A.2d 333 (1980). Because the legislature has afforded a teacher dismissed for cause the right to judicial review of that determination, it is our task to ensure that that right is meaningfully *235 protected. Id., 83, 434 A.2d 333. Such protection necessarily includes a fair hearing by an impartial panel. *Catino v. Board of Education,* supra, 174 Conn. 418, 389 A.2d 754.

The central issue in this case, as correctly posed by the majority opinion below, "becomes what constitutes an impartial hearing panel sufficient to satisfy constitutional due process. Due process requires a fair hearing before a fair tribunal, which principle applies with equal vigor to administrative adjudicatory proceedings. *Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973)." *Petrowskiv. NorwichFreeAcademy,* supra, 2 Conn.App. 554, 481 A.2d 1096.

The defendants do not dispute the proposition as stated in the dissenting opinion of the Appellate Court, that "had Tillinghast and Dutton been judges participating in a judicial proceeding, they would have been disqualified, because the relationship between their law firm and the academy would have violated the governing standard for judicial disqualification, which is the reasonable appearance of impropriety." *Petrowskiv. NorwichFree Academy,* supra, 566, 481 A.2d 1096 *(Borden, J.,* dissenting); see *Papa v. New Haven Federation of Teachers,* 186 Conn. 725, 746, 444 A.2d 196 (1982) . The claim of the defendants is simply that the Appellate Court erred in equating the due process standards governing disqualification of administrative adjudicators with the principles governing judicial disqualification.

[3] A due process analysis requires balancing the governmental interest in existing procedures against the risk of erroneous deprivation of a private interest through the use of these procedures. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Due process demands, however, the existence of impartiality on the part of those who function in judicial or quasi-judicial capacities. *N.L.R.B. v. Ohio New and Rebuilt Parts, Inc.,* 760 F.2d 1443, 1451 (6th Cir.1985); *236 see, e.g., **142*Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-43, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); *Wolkenstein Reville,* 694 F.2d 35 (2d Cir.1982), cert. denied, 462 U.S. 1105, 103 S.Ct. 2452, 77 L.Ed.2d 1332 (1983). The courts recognize the presumption that administrators serving as adjudicators are unbiased. See *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, [1]13 L.Ed.2d 712 (1975); *United States v. Morgan,* 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1940). This presumption can be rebutted by a showing of a conflict of interests; see *Gibson v. Berryhill,* 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973); *Ward v. Monroeville,* 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972); but the burden of establishing a disqualifying interest rests on the party making the contention. *Schweiker v. McClure,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The impermissible interest asserted must be realistic and more than "remote." *Marshall v. Jerrico, Inc.,* supra, 446 U.S. 250, 100 S.Ct. at 1617.

" 'The fact that [an administrative hearing officer] might have been disqualified as a judge ... does not, either in principle or under the authorities, infect the hearing with a lack of due process.' *Lopez v. Henry Phipps Plaza South, Inc.,* 498 F.2d 937, 944 (2d Cir.1974)." *Petrowskiv. NorwichFreeAcademy,* supra, 2 Conn.App. 567, 481 A.2d 1096 *(Borden, J.,* dissenting); see *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970). In *Schweiker v. McClure,* supra, the United States Supreme Court reversed a decision of the District Court which had held that the connection between an insurance carrier whose employees initially had denied Medicare claims and the hearing officers appointed by the carrier to review such denials, whose salaries were paid from federal funds,

created a constitutionally intolerable risk of bias against Medicare claimants. The lower court had based its decision, in part, on the judicial canons concerning disqualification. *237*McClure it Harris,* 503 F.Supp. 409, 414-15 (N.D.Cal.1980 ); Code of Judicial Conduct, 3(C)(1)(b). The Supreme Court reversed, finding no basis for a disqualifying interest among the hearing officers and noting that the district court's analogy to judicial canons was not "apt." *Schweiker v. McClure,* supra, 456 U.S. 197 n. II, 102 S.Ct. 1671 n. I1. In *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-74 (2d Cir.I984), the Second Circuit Court of Appeals noted that although arbitrators do act in a quasi-judicial capacity, the disqualification standard for judges need not be applied. "The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator." Id.; see *Morelite Construction Corporation v. Carpenters Benefit Funds,* 748 F.2d 79, 85 (2d Cir.1984); *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 552 (2d Cir.)cert. denied, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

In support of the proposition that due process requires that administrative adjudicators performing quasi-judicial functions be held to judicial standards of conduct, the Appellate Court relied on *Withrow v. Larkin,* 421 U.S. 35, 46-51, 95 S.Ct. 1456, 1464-66, 43 L.Ed.2d 712 (1975). The majority opinion concluded that "[t]he due process requirement of an impartial hearing body in the quasi-judicial realm is equivalent to that requirement in the judicial realm." *Petrowskiv. NorwichFreeAcademy,* supra, 2 Conn.App. 560, 481 A.2d 1096. An examination of *Withrow v. Larkin,* however, supports only the proposition that conduct by an administrator which would not require disqualification under judicial standards is constitutionally permissible. From this holding it is logical to deduce only that conduct complying with judicial standards also satisfies those applicable to administrative adjudicators. The conclusion of the Appellate Court, equating administrative with judicial standards, assumes that *Withrow* stands also for the converse proposition, that an interest disqualifying a judge would necessarily disqualify an administrator.

*238 [4] The applicable due process standards for disqualification of administrative **143 adjudicators do not rise to the heights of those prescribed for judicial disqualification. *Schweiker v. McClure,* supra. The canons of judicial ethics go far toward cloistering those who become judges, the ultimate arbiters of constitutional and statutory rights, from all extraneous influences that could even remotely be deemed to affect their decisions. Such a rarefied atmosphere of impartiality cannot practically be achieved where the persons acting as administrative adjudicators, whose decisions are normally subject to judicial review, often have other employment or associations in the community they serve. It would be difficult to fmd competent people willing to serve, commonly without recompense, upon the numerous boards and commissions in this state if any connection with such agencies, however remotely related to the matters they are called upon to decide, were deemed to disqualify them. Neither the federal courts nor this court require a standard so difficult to implement as a prerequisite of due process of law for administrative adjudication.

Further, in reference to the plaintiffs broader constitutional claim raised in her preliminary statement of issues, she has simply failed to show that Tillinghast and Dutton had a disqualifying interest sufficient to overcome the "presumption of honesty and integrity" of the board of trustees. *Withrow v. Larkin,* supra, 421 U.S. 47, 95 S.Ct. 1464. The applicable due process standards for disqualification of officials acting in a judicial or quasi-judicial capacity are detailed in *In re Murchison,* 349 U.S. 133, 137, 75 S.Ct. 623, 625-26, 99 L.Ed. 942 (1955). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case *239 and no man is permitted to try cases where he has an interest in the outcome." Id., 136,75 S.Ct. 625. The constitutional parameters of this standard are discussed in two United States Supreme Court cases, *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71. L.Ed. 749 (1927), and *Dugan it Ohio,* 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784

(1928). Although neither of these cases is determinative we must look to each in evaluating the case before us. See *Wolkenstein v. Reville,* supra, 39.

In *Tumey v. Ohio,* supra, the court invalidated a procedure whereby the mayor of the village assessed fines against defendants convicted of violating the state's prohibition act. The mayor received costs, in addition to his regular salary, as compensation for hearing such cases. No costs were paid to him, however, unless the defendant was convicted. Under the state statute the village retained one-half of the fines assessed in the court. The procedure was held constitutionally defective because (1) the mayor as an individual had a " direct, personal, pecuniary interest" in the costs he received and (2) as the village chief executive he had a strong "official motive" to assess fines to improve the financial position of the village. Id., 273 U.S. 531-35,47 S.Ct. 444-45.

In *Dugan v. Ohio,* supra, a similar procedure was upheld. Because the mayor of the city was a salaried official and did not receive costs, the first ground of *Tumey v. Ohio* was inapplicable. Despite the fact that one-half the fines imposed were retained by the city, the court sustained the procedure because the mayor was not, as in *Tumey v. Ohio,* the chief executive of the city. The mayor's power under the city charter, as one of the five members of the city commission, was too " remote" to create a practical conflict of interest. *Dugan v. Ohio,* supra, 277 U.S. 65, 48 S.Ct. 440; see also *Marshall v. Jerrico, Inc.* supra (child labor violations adjudicated by administrators employed by department of labor; department reimbursed for costs in assessing fines; due process *240 claim rejected because no "reasonable possibility" that administrator's judgment would be colored by prospect of institutional gain); ***144Hortonville Joint School District No. I v. Hortonville Education Assn.,* 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976) (teacher disciplinary proceedings conducted by seven person board; due process challenge rejected because board members had no personal or financial interest that required disqualification); *Ward v. Monroeville,* supra (due process violation where village received substantial portion of assessed fines and mayor had "wide executive power "); *N.L.R.B. v. Ohio New and Rebuilt Parts, Inc.,* supra, 1451 (possibility of "performance awards" to labor adjudicators from efficient adjudication of disputes does not violate due process); *Simard v. Board of Education,* 473 F.2d 988 (2d Cir.1973 973) (no due process violation where local board of education denied the plaintiff tenure, after the board had engaged in "heated negotiations" with the plaintiff, because the relationship established only potential, rather than actual, bias).

[5] From the viewpoint of these guidelines, participation by Tillinghast and Dutton did not render the termination hearing defective under the federal constitution. There was no evidence that either trustee had a "direct, personal, pecuniary interest" in the termination of the plaintiff. Furthermore, since they were only two members of an eight person board of trustees, they lacked a sufficient "official motive" to render the proceeding constitutionally infirm. *Dugan v. Ohio,* supra, 277 U.S. 65, 48 S.Ct. 440. Tillinghast and Dutton's membership in the law firm that represents Norwich Free Academy on unrelated matters is too remote and tenuous a connection to have required, under due process principles, their disqualification from the board.

Quite apart from due process, the plaintiff also argues that under state law the presence of Tillinghast and Dutton on the board deprived her of a fair and impartial*241 tribunal for her termination hearing. [FN3] She relies on the principle first declared in *Low v. Madison,* 135 Conn. 1, 6, 60 A.2d 774 (1948), that the appearance of impropriety created by a public official's participation in a matter in which he has a pecuniary or personal interest is sufficient to require disqualification. See General Statutes §§ 8-11 and 8-21. "This prophylactic rule serves the salutary purposes of promoting public confidence in the fairness of the decision-making process and preventing the public official from placing himself in a position where he might be tempted to breach the public trust bestowed upon him. See *Thorne v. Zoning Commission,* [178 Conn. 198, 203-205, 423 A.2d 861 (1979) ]." *Gaynor-Stafford Industries, Inc. v. Water Pollution Control Authority* 192

Conn. 638, 649-50, 474 A.2d 752 (1984). The test is not whether the personal interest does conflict but whether it reasonably might conflict. *Josephson v. Planning Board,* 151 Conn. 489, 493-95, 199 A.2d 690 (1964). If a member of a board of education fails to disqualify himself despite a real conflict of interests, the action of the board on which he participated is rendered invalid. See *Kovalik v. Planning & Zoning Commission,* 155 Conn. 497, 499, 234 A.2d 838 (1967).

FN3. In her preliminary statement of alternative issues upon which the decision of the Appellate Court may be affirmed, the plaintiff refers to a violation of her " right to due process under Connecticut General Statutes § 10-151" as well as under the federal constitution. Despite the contention of the defendants to the contrary, we construe this reference as an invocation of state decisional law relating to the disqualification of administrative adjudicators. General Statutes (Rev. to 1983) § 10-151(b) sets forth the procedure for termination of a tenured teacher, such as the plaintiff, including the right to a hearing before the board of education or a statutory "impartial hearing panel." Even though the plaintiff chose not to exercise her option under this subsection to have such an "impartial hearing panel" appointed to hear her-case, the statute must also be deemed to require impartiality upon the part of the trustees, acting as a board of education, to the extent demanded by our decisions relating to officials acting in a quasi-judicial capacity. Thus our discussion of the plaintiffs additional claim, which was also raised in the Appellate Court, is appropriate. *State v. Torrence,* 196 Conn. 430, 434, 493 A.2d 865 (1985).

*242 [6] Whether an interest justifies disqualification is necessarily a factual question and depends upon the circumstances of **145 the particular case. *Armstrong v. Zoning Board of Appeals,* 158 Conn. 158, 171-72, 257 A.2d 799 (1969). In subjecting those circumstances to careful scrutiny, courts must exercise a great degree of caution. *Dana-Robin Corporation v. Common Council,* 166 Conn. 207, 214, 348 A.2d 560 (1974). Local governments and school boards would "be seriously handicapped if' any conceivable interest, no matter how remote and speculative, would require the disqualification of a [public] official." *Anderson v. Zoning Commission,* 157 Conn. 285, 291, 253 A.2d 16 (1968). Here, the Superior Court heard the evidence presented and came to the " factual conclusion" that the interests of Tillinghast and Dutton were too remote and nebulous to have required their disqualification. The evidence presented clearly supported that conclusion.

Moreover, we are constrained to point out that the plaintiff chose to have her case adjudicated by the board of trustees, rather than, as was her statutory option, by a three-person "impartial hearing panel" as envisioned by General Statutes (Rev. to 1983) § 10-151 (b). Therefore, she . selected as her adjudicators a group of individuals who had a pre-existing fiduciary duty, as members of the board of trustees, to act in the best interests of the academy. The effective operation of this statutory scheme necessitates an assumption that such board members, when faced with an issue of teacher termination, will put aside their general loyalty to the academy and act conscientiously. *Petrowskiv. NorwichFreeAcademy,* supra, 2 Conn.App. 570, 481 A.2d 1096 *(Borden, J.,* dissenting).

Both Tillinghast and Dutton, as well as the other six members of the board, had, by virtue of their very presence on the board of trustees, some prior association with the administration of the academy. None of the board members, including Tillinghast and Dutton, had *243 any prior association with the plaintiff that could have amounted to a disqualifying interest. The only basis for disqualification presented by the plaintiff was their membership in a law firm that handled legal matters for the academy wholly unrelated to the controversy they were to consider. The attorney-client relationship between their firm and the academy merely created on the part of Tillinghast and Dutton a duty of loyalty to the academy essentially congruent with the fiduciary duty imposed upon them as trustees. We

see no reason to presume that this additional ground for their loyalty to the academy should disqualify them any more than the other trustees, who were also obligated to act in the best interests of the institution they served. This "double-layered fealty, " as the Appellate Court characterized it, of Tillinghast and Dutton cannot reasonably be deemed to have affected their judgment upon the issues any more than the single-sourced loyalty of the other trustees. The dispute over termination of the plaintiff did not involve Tillinghast and Dutton to a greater extent than the other trustees. There was no showing of any connection between their law firm and the school officials or other persons who were advocating the termination of the plaintiff. We conclude that membership in a law firm that has handled legal matters for an institution that are wholly unrelated to the controversy to be decided or the persons involved therein, does not constitute, under the circumstances of this case, a disqualifying interest for administrative adjudicators under federal or state law.

The judgment of the Appellate Court is reversed, and the case is remanded to that court with direction to reinstate the judgment of the trial court.

In this opinion the other Judges concurred.
Conn.,1986.
Petrowski v. Norwich Free Academy
199 Conn. 231, 506 A.2d 139, 31 Ed. Law Rep. 485

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Part I. The Internal Processes
Chapter 6. Integrity in the Administrative Process
A. Distortion of the Decision

## § 6.12. Ex parte

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CIS., Public Administrative Law And Procedure §§ 61, 138

111 Adjudication

The APA contains a broad proscription against *ex parte* communications in formal adjudication but it recognizes that the problem is somewhat different for internal and external contacts. Internal contacts tend to be treated as separation of function, problems;[FN1] so that internal contact with other than investigators-prosecutors are not expressly prohibited.[FN2] However the APA deals at some length with external *ex parte* contacts.

*(a) Communication with those outside the agency.* The original APA prohibited *ex parte* communication between decisionmakers and persons outside the agency and in 1976 Congress tightened the proscription against external *ex parte* communication by amending APA § 557(d).[FN3] The APA defines *ex parte* communication: " an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given but shall not include requests for status reports on any matter or proceeding covered by this subchapter."[FN4] Congress enacted the provisions prohibiting *ex parte* communication to ensure that "agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome."[FN5 ]

Congress recognized, however, that not all communications between agency decisionmakers and interested parties would contravene the purpose of the prohibition against *ex parte* communications. Excluded from the proscribed communications were those contacts that do not affect the way a given case is decided.[FN6] A decisionmaker's disclosure as to the progress or completion of a proceeding is not an illegal *ex parte*

communication.[FN7]

The APA expressly prohibits *ex parte* communication in formal adjudications, i.e. where an adjudication must be "on the record."[FN8] Agency regulation may not exempt a decisionmaking body from this requirement.[FN9] The Ninth Circuit held that the *a pane* requirement applied to the Bureau of Land Management's "Endangered Species Committee:"

> The public's right to attend all committee meetings, participate in all Committee meetings, and have access to all Committee records would be effectively nullified if the Committee were permitted to base its decisions on the private conversations and secret talking points and arguments to which the public and the participating parties have no access.[FN10 ]

Thus it remanded for an evidentiary hearing, rather than grant the requested discovery, as to whether the White House had engaged in illegal *ex parte* contacts with the Committee.[FN11]

A number of administrative functions involve meetings and communications with those who deal regularly with the agency. The agency builds experience and expertise through these recurring contacts.[FN12] The prohibition against *ex parte* communication must be tempered by the need to allow the agency to do its job. In order to build a case for illegal *ex parte* communication, one must show that such contacts would lead a disinterested observer to infer that the contacts will affect the decision. The fact that the agency had recurring, but independent, contacts with an interest which is also party in a pending case is not enough.[FN13]

An agency cannot be said to have allowed an illegal *a parte* communication because information was submitted to it. While disclosure may be required of such communications in general, inconsequential communication may require no special treatment.[FN14]

As discussed in § 5.50[3], a party has a general right to be present. However that some of the evidence was taken when the party was voluntarily absent, an absence that was advised and approved by his lawyer, does not turn an otherwise fair hearing into an *a parte* proceeding.[FN15]

*Ex parte* discussions during the hearing might improperly deny one an opportunity to protect their interests. In contrast, a party is denied due process when an *ex pane* discussion denies them of a hearing or opportunity to be heard.[FN16] On the other hand, if a *ex parte* consultation would be appropriate at a trial, it should be acceptable in an administrative hearing.

Official contact with the parties does not usually constitute illegal *a parte* communication. Thus the fact that an ALJ met with the parties to facilitate a settlement and does not evidence illegal *ex parte* communication.[FN17]

*(b) Communication within the agency.* Prohibition against ex *parte* communication overlaps with the separation of functions doctrine, discussed above, when the *a parte* communication comes from inside the agency. However *a parte* communication from staff not involved in prosecution and investigation are not covered by the separation of functions doctrine. Generally, communication from the agency's nonlitigation staff will not constitute illegal *ex parte* communication.

In Burke v. Board of Governors of Federal Reserve System,[FN18] for example, the Board's legal department issued a legal memorandum to it. The Court rejected the argument that this constituted an illegal *ex parte* communication. It found that the restriction against *ex parte* communication in § 557 of the APA "does not apply to contacts within the agency."[FN19]

"[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper."[FN19.1]

*(c) Discovery.* Building a case in support a claim of *ex pane* communication may be difficult because, by definition, the illegal contact was secret. Therefore discovery may be necessary in such a challenge. The Ninth Circuit granted judicial discovery in Public Power Council v. Johnson[FN20] "because of the unusual combination of: (I) the novelty of the issues presented; (2) the need for extremely prompt action under the pertinent statute; and (3) the significance of the questions presented in the petition for review."[FN21] However, it found that an administrative evidentiary hearing was appropriate where the purposes of the act would not be frustrated or imperiled by allowing the agency to develop the necessary facts and initially determining whether the APA had been violated.[FN22]

*(d) Remedies.* The remedy for *ex pane* contacts, unlike bias or combination of functions, cannot be disqualification; otherwise a party could eliminate unfavorable decisionmakers by initiating *a parte* contacts with them.[FN23] The remedy is to place the communication on the public record.[FN24] The person who knowingly commits an *a parte* contact, however, may be deprived of the opportunity for a hearing and forfeit the contested interest.[FN25] Of course, if the *ex parte* communication is not cured at the agency level the administrative decision may be overturned on judicial review.

While the customary cure for *ex parte* communication is to place the communication on the public record, it may be that the communication so taints the deliberation that the agency decision is voidable. The company charged that the FTC waited too long to make public *ex parte* communications in Southwest Sunsites, Inc. v. FTC.[ FN26] The Court established this test for *ex parte* communication which could invalidate a decision:

> Relevant considerations are the gravity of the ex parte communication, whether the communication may have influenced the decision, whether the party making the communication benefited from the decision, whether opposing parties knew of the communication and had an opportunity to rebut, and whether vacation and remand of the decision would serve a useful purpose .... The court is concerned primarily with the integrity of the process and the faimess of the result rather than adherence to mechanistic rules.[FN27]

Here the Court found that the disclosure was sufficient to save the decision.[FN28]

In the extreme case, where a person knowingly attempts an illegal ex parte communication, the APA provides that the person may be subject to an adverse decision because of the violation.[FN29]

A challenge of *ex parte* communication must generally be made on the appeal of the final order. A court should presume that the agency process will cure any taint of a *parte* communication and hence it should not accept interlocutory review of that issue.[FN30]

121 Rulemaking

As in adjudication, the problems with *a parte* communication must be divided into situations where the decisionmaker has contacts outside the agency and those where they have contact with members of the agency staff. Again the preventive measures for a *parte* communication are not so strictly applied in rulemaking as they are in adjudication.

Moreover, since rulemaking should be a public process, any questionable *ex parte* communication need only be added to the rulemaking record to avoid any charge of impropriety. Disclosure should be generally sufficient because disclosure is sufficient even in adjudication.[FN31]

2 Admin. L. & Prac. § 6.12 (2d ed.)

*(a) Outside contacts.* Generally, ex parte communication is not a strong prohibition in rulemaking proceedings.[FN32] The APA provisions controlling ex parte communication do not apply to notice and comment rulemaking (but may apply to formal rulemaking).

Substantial prohibition against *ex parte* communication in rulemaking was attempted in Home Box Office v. FCC.[FN33] Home. Box Office involved a challenge to FCC rules which limited the program fare for cable television and subscription television. The rules for cable television set the type of movies and sports programming, prohibited commercial advertising and limited movies and sports to 90% of the programming. The stated purpose was to prevent bidding away, or "siphoning", popular program material from free television. During the rulemaking, a complaint was filed with the FCC alleging illegal *ex parte* communication but the Commission took no action. This complaint was reiterated in the judicial appeal. It was uncontested that participants did have *ex parte* contacts with individual commissioners and Commission employees.[FN34] "[T]he evidence is certainly consistent with often-voiced claims of undue industry influence over Commission proceedings, and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion of the public interest for Communications Act vents in individual commissioners."[FN35] The Court found intolerable the notion, not of *ex parte* communication, but that there may have been "one administrative record for the public and this court and another for the Commission."[FN36] The Court found that under those circumstances it could not fulfill its obligation set out by the Supreme Court in Overton Park[FN37] to review the Commission's actions based on the record actually before the agency at the time the administrative decision was made. Thus it was agency secrecy, not so much *wc parte* communication, which bothered the Court.[FN38] Where the justification for the action does not match the actual information considered, the rulemaking must be considered arbitrary.[FN39] Moreover the failure to disclose all that was being considered prevents the full "adversarial critique"[FN40] and in theoretical terms it is inconsistent with fundamental notions of fairness and due process.[FN41] The Court attempted to reconcile the conflict between the value of public airing and the value of informal contacts. In doing so it set forth this standard of conduct:

> [C]ommunications which are received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. Of course, if the information contained in such a communication forms the basis for agency action, under well established principles, that information must be disclosed to the public in some form. Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process [should refuse to discuss the rule with interested persons]. If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.[FN42]

As a remedy in this case, the Court ordered an administrative hearing to determine the nature and source of all ex parte contacts and filed a supplemental record with the Court.[FN43]

That part of Judge Wright's opinion which abhors government secrecy and recognizes the value in rulemaking of permitting a total airing of all relevant information is sound but that part which applies to rulemaking the same concept of *ex parte* communication as applied to adjudication is wrong. As Judge MacKinnon suggests in his concurring opinion the decision may have gone too far if applied across-the-board to all rulemaking.[FN44]

Judge Tatum for another panel of the D.C. Circuit was able to nullify these excesses of the Home Box Office opinion. His opinion in Action for Children's Television v. FCC[FN45] did much to bring Home Box Office into perspective. The case involved a proposed rule from Action for Children's Television (ACT) to limit commercial advertising in children's programs and to provide a minimum amount of age-specific programming for children. The broadcast industry responded by instituting self-regulation and convincing the FCC to suspend the rulemaking

until the impact of the self-regulation could be measured. ACT challenged the agency's negotiation with the industry as being the result of ex parte exchanges. The Court permitted ACT to raise the claim even though it had failed to present the challenge to the agency because the Court found that a petition for reconsideration to the agency would be futile. While the Court sympathized with the frustration over the FCC's deference to the industry and the failure to put the industry's proposal out for comment, it refused to find an abuse of discretion.[FN46] The Court found that Home Box Office did not apply to this case and, in doing so, substantially limited that case. That case, the Court found, adopted "an overreaching principle of administrative law and should not be applied generally to administrative law."[FN47] On the law, it found that Sangamon Valley,[FN48] relied on in Home Box Office, had been greatly limited only two years after the decision by the same circuit in Courtaulds (Alabama) Inc. v. Dixon,[FN49] and that Sangamon was contrary to the Circuit's law expressed in Van Curler Broadcasting Corp. v. United States.[FN50] It also questioned whether the "somewhat Delphic opinion" in Citizens to Preserve Overton Park v. Volpe,[FN51] could be extended to cover rulemaking.[FN52] More importantly, however, the Court noted the practical difficulties and questionable usefulness of the machinery proposed in Home Box Office for dealing with ex parte communication. Bureaucrats are not so untrustworthy as Judge Wright alleges, nor does his procedure go far enough in protecting the public if they are. For these reasons, Judge Tamm stated "It is at that point where the potential for unfair advantage outweighs the practical burdens, which we imagine would not be unsubstantial, that such a judicially conceived rule would place upon administrators."[FN53] Thus he found that the circumstances presented in this case were "not of the kind that made this rulemaking action susceptible to poisonous ex parte influence."[FN54]

The Administrative Conference, based on a report by Nathanson,[FN55] opposed a general prohibition against *ex parte* contacts in rulemaking. It recognized the potential value *a parte* communication may have for successful rulemaking if properly used. It did identify three concems, however, which needed some preventive measures. It was concerned that in some situations ex *parte* contacts would influence the decisionmaker and that information relied on would not be available for judicial review. The most difficult balance, however, arose from its concern on one hand that participants would be cut off from replying to *ex parte* comments and on the other the increased information which might be made available through *ex parte* exchanges.[FN56] Thus it recommended that agencies put on the public record all *a pane* written communication received after the notice and that they experiment with techniques for disclosing oral communications. While it opposed a general prohibition, it did recommend that " [a]gencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the need of judicial review arising from special circumstances."[FN57]

Vermont Yankee[FN58] may well limit the ability of the courts to participate in this inquiry. Since there is no prohibition against ex parte communication in § 553, the Supreme Court's prohibition against judicial imposition of procedures not included in the APA may withdraw courts from this conflict.[FN59] After that case, *a parte* contacts are regulated only in those agencies where Congress or the agency's own rules prohibit *ex parte* communications.[FN60] Nonetheless an agency would be well advised to place ex *parte* comments on the record if feasible. Where they have been disclosed, it is unlikely that they will lead to reversal of a rule.[FN61]

*(b) Internal contacts.* Whatever limitations are imposed on *ex parte* communications between the decisionmaker and those outside the agency, there are none on *a parte* communications between the decisionmaker and the agency staff The dangers which gave rise to the censure of Home Box Office, the Judge in that case, Judge Wright, has held do not arise in the context of communications within the agency.[FN62] Nor is it impermissible for a staff member who met informally with affected persons to then participate in drafting the final rule.[FN63]

As we have said above, separation of functions is not required for rulemaking and hence communication between the decisionmaker and members of the investigative staff are permitted. Hercules, Inc. v. EPA,[FN64] has become the leading case for this proposition. There the employee in charge of drafting the rule used other members of the agency staff The EPA had adopted a procedural rule specifically permitting staff assistance for the

Administrator or presiding officer in reviewing the rulemaking record and drafting the rule.[FN65 ] Ms. Marple was assigned to assist the Administrator. She consulted several members of the staff in her work with the record. The Court first found that the final rule's agreement with the staffs recommendation did not establish that other views were not considered. It also noted that the officials acted in good faith. Thus the question was whether contacts between the staff and the decisionmaker could alone invalidate the rulemaking. The Court noted that there was no injection of extra-record evidence through the *ex parte* communications.[FN66] Consultation occurred to find information in the rulemaking record and to use the agency's experts. The Court found that neither the APA nor anything in its legislative history proscribed staff assistance in rulemaking decision.[FN67] Nonetheless it did question the propriety of consultations with staff "advocates" in the rulemaking process. It observed: "That the attorneys who represented the staffs position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultation did not involve factual or policy issues."[FN68] It, therefore, urged agencies and Congress to " proscribe post-hearing contacts between staff *advocates* and decisionmakers."[FN69] It also suggested that disclosure of such contacts should be considered.[FN70]

[3] State law on *ex parte* communications

*(a) Adjudication.* States vary a good deal with respect to *ex parte* communication in adjudications. However the rule is that *ex parte* communication is prohibited in formal adjudications.[FN71] In Arkansas, in order to violate an *ex parte* communications statute concerning issues of law or fact relating to an adjudicatory proceeding, proof of the existence and content of the alleged communication must be shown.[FN72]

The Supreme Court of South Carolina interpreted the purpose of South Carolina Constitution's Article I, § 22 to be to ensure that adjudications are conducted by impartial administrative bodies.[FN72.1] The Court further stated that a violation of this constitutional provision would occur if an adjudicator "either has ex parte information as a result of prior investigation[s] or has developed, by prior involvement with the case, a 'will to win.' "[FN72.2 ] The Court in Ross found that the adjudicator had not had "access to information which he obtained as a result of his investigation but which he should not have considered in making his decision regarding " the appellant, and there was no evidence that the adjudicator could not make an objective decision. Therefore, the court found no constitutional violation.[FN72.3] The Supreme Court of South Carolina stated that "although the Court condemns ex parte communication, it has refused to adopt a per se rule automatically reversing rulings which result from ex parte communications. Instead, the Court considers whether prejudice results from the ex parte contact."[FN72.4]

The Connecticut Court stated: "Receipt of ex parte evidence merely shifts the burden of proof from the aggrieved party to the applicant to demonstrate that the communication was harmless."[FN72.5]

The Supreme Court of Indiana held that a board of county solid waste management's consideration of a permit application was a function of both adjudication and legislation, and therefore ex parte communications by board members with public citizens regarding the application were proper because the board was a local agency expected to respond to concerns of its constituents. Since it was not a court proceeding, the input could be received in a less formalized manner.[FN72.6]

In North Dakota, ex parte communications are those that do not afford notice and opportunity for all parties to participate. The N.D. APA permits certain ex parte communications in administrative proceedings, but prohibits others. In general, an agency hearing officer may not communicate about any issue in a proceeding with anyone affected by or participating in that hearing while it is pending. There are two exceptions. First, if more than one person is acting as the hearing officer, those persons can communicate with each other about a matter pending before the panel. They may also communicate with their staff assistants if those assistants do not "furnish, augment, diminish, or modify the evidence in the record." Second, if a proceeding is conducted with someone other than the agency head acting as the hearing officer, the administrative agency's counsel and the agency head may communicate on common attorney-client issues without notice and opportunity for other party participation. Except for settlement and negotiation, this second exception does not extend to communication occurring after

recommended findings of fact, conclusions of law, and orders have been issued. Thus, the North Dakota Supreme Court found that three communications held before an ALJ decision were not improper and did not have to be disclosed after that decision, but one letter from outside counsel to inside counsel mailed after the ALJ decision was an improper ex parte communication.[FN72.7]

*(b) Rulemaking.* The drafters of the 1981 Model State Administrative Procedure Act (81 MSAPA) placed few restraints on oral *ex parte* communications in rulemaking. They refused to prohibit such communication or even to require that such communications be included in the public record.[FN73] They were convinced by the scholarly observations from Antonin Scalia.[FN74] He urged: "An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of [the legislature] and the vitally concerned interest groups; and it will often be unable to fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record."[FN75] Counter to this view is one which looks to the adequacy of the information upon which the agency relied. If that information is not made available for comment, then its integrity and accuracy may be questioned. The drafters rejected for practical reasons a compromise which would have required written summary of all factual materials going to the technical merits of a proposed rule.[FN76]

[FNa0] Dudley W. Woodbridge Professor of Law, College of William and Mary, Marshall-Wythe School of Law.

[FN1] 5 U.S.C.A. § 554(d).

[FN2] Both the Senate and House Reports on the APA explain the scope of § 557(d): "Communication solely between agency employees are excluded from the section's prohibition." S.Rep.No. 354, 94th Cong., 1st Sess. 36 (1975); H.R.Rep.No. 880, 94th Cong., 2d Sess. 20 (1976); 1976 U.S.Code Cong. and Admin.News, 2202. See EDF v. EPA, 510 F.2d 1292, 1305 (D.C.Cir. I 975).

[FN3] 5 U.S.C.A. § 557(d); see also MSAPA § 4-213.

[FN4] 5 U.S.C.A. § 55104).

[FN5] 1976 U.S.Code Cong. & Admin.News, 2183, 2184.

[FN6] 1976 U.S.Code Cong. & Admin.News, 2202.

Electric Power Supply Ass'n v. FERC, 391 F.3d 1255, 1259 (D.C.Cir.2004) ("The key to exclusion [from the prohibition against ex parte communication] under the Sunshine Act is not the label given the communication, but rather whether there is a possibility that the communication could affect the agency's decision in a contested on-the-record proceeding.").

[FN7] Raz Inland Navigation Co. Inc. v. JCC, 625 F.2d 258, 262 (9th Cir.1980).

[FN8] Portland Audubon Soc. v. Endangered Species Committee, Oregon Lands Coalition, 984 F.2d 1534, 1542 (9th Cir.1993)

[FN9] 984 F.2d at 1543.

[FM 0] 984 F.2d at 1543.

[FN11] 984 F.2d at 1550.

[FN12] Louisiana Ass'n of Indep. Producers v. F.E.R.C., 958 F.2d 1101, 1112 (D.C.Cir.1992).

[FN13] 958 F.2d at 1112.

[FNI4] Century Federal, Inc., v. FCC, 846 F.2d 1479, 1482 (D.C.Cir.1988) (The existence of letters written to the agency in support of an applicant for a construction permit raise at most an inconsequential *et parte* question.).

[FN15] Fitzhugh v. DEA, 813 F.2d 1248, 1253 (D.C.Cir.1987).

[FN16] Yohn v. Love, 76 F.3d 508, 517 (3d Cir.1996) (The party's attorney was denied the opportunity to participate in the conversation between the prosecutor and the Chief Justice and was not informed that the conversation turned from a request for a stay to a discussion on the merits of admitting a tape. The party was also denied notice that the merits of the tape's admissibility were going to be discussed and to have opportunity to present his side. The result allowing the tape does not negate the procedural violations which occurred.).

[FN17] New York State Dept. of Law v. FCC, 984 F.2d 1209, 1217 (D.C.Cir.1993); Louisiana Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1112 (D.C.Cir.1992).

[FN18] Burke v. Board of Governors of Federal Reserve System, 940 F.2d 1360 (10th Cir.1991), cert. denied 504 U.S. 916, 112 S.Ct. 1957, 118 L.Ed.2d 559 (1992).

[FN19] 940 F.2d at 1368.

[FN19.1] White v. Indiana Parole Bd., 266 F.3d 759, 766 (7th Cir.2001).

[FN20] Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir.1982).

[FN21] Portland Audubon Soc. v. Endangered Species Committee, Oregon Lands Coalition, 984 F.2d 1534, 1549 (9th Cir.1993).

[FN22] 984 F.2d at 1549-1550.

[FN23] Power Authority of the State of New York v. FFRC, 743 F.2d 93, 110 (2d Cir.1984) (Even ex parte communications from congressmen will not disqualify.).

[FN24] 5 U.S.C.A. § 557(d)(1)(C).

[FN25] 5 U.S.C.A. § 557(d)(1)(D).

[FN26] Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir.1986), cert. denied 479 U.S. 828, 107 S.Ct. 109, 93 L.Ed.2d 58 (1986).

[FN27] 784 F.2d at 1436.

[FN28] 785 F.2d at 1437; See also Power Authority of State of New York v. FERC, 743 F.2d 93, 110 (2d Cir.1984).

[FN29] 5 U.S.C.A. §§ 556(d) & 557(d)(1)(D).

[FN30] North Carolina Environmental Policy Institute v. EPA, 881 F.2d 1250, 1257-1258 (4th Cir.1989).

[FN31] 5 U.S.C.A. § 557(d).

[FN32] National Small Shipments Traffic Conference, Inc. v. 1CC, 725 F.2d 1442 (D.C.Cir.1984).

Texas Office of Public Utility Counsel v. FCC, 265 F.3d 313, 327 (5th Cir.2001).

[FN33] Home Box Office v. FCC, 567 F.2d 9 (D.C.Cir.1977), cert. denied 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977), rehearing denied 434 U.S. 988, 98 S.Ct. 621, 54 L.Ed.2d 484 (1977), appeal after remand 587 F.2d 1248 (D.C.Cir.1978).

[FN34] In response to a court order, the Commissioner compiled a 60 page listing showing a *parte* contacts with virtually every party to the rulemaking.

[FN35] 567 F.2d at 53.

[FN36] 567 F.2d at 54.

[FN37] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), on remand 335 F.Supp. 873 (W.D.Tenn.1972), supplemented 357 F.Supp. 846 (W.D.Tenn.1973), reversed 494 F.2d 1212 (6th Cir.1974), cert. denied 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975).

[FN38] 567 F.2d at 54.

[FN39] 567 F.2d at 54-55.

[FN40] See United States Lines, Jnc. v. FMC, 584 F.2d 519, 533-534 (D.C.Cir.1978); National Small Shipments v. ICC, 590 F.2d 345 (D.C.Cir.1978) (wrongful *ex parte* communication found in informal action which probably was not rulemaking.).

[FN41] 567 F.2d at 55-56. Citing, Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C.Cir.1959).

[FN42] 567 F.2d at 57.

[FN43] 567 F.2d at 58-59.

[FN44] 567 F.2d at 61.

[FN45] Action for Children's Television v. FCC, 564 F.2d 458 (D.C.Cir.1977).

[FN46] 564 F.2d at 472-73.

[FN47] 564 F.2d at 475.

[FN48] Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C.Cir.1959).

[FN49] Courtaulds (Alabama) Inc. v. Dixon, 294 F.2d 899 (D.C.Cir.1961).

[FN50] Van Curler Broadcasting Corp. v. United States, 236 F.2d 727 (D.C.Cir.1956).

[FN51] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Q. 814, 28 L.Ed.2d 136 (1971), on remand 335 F.Supp. 873 (W.D.Tenn.1972), supplemented 357 F.Supp. 846 (W.D.Tenn.1973), reversed 494 F.2d 1212 (6th Cir.1974), cert. denied 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975).

[FN52] 564 F.2d at 476-477.

[FN53] 564 F.2d at 477.

[FN54] 564 F.2d at 477.

[FN55] Nathaniel Nathanson, Report to the Select Committee on Ex pane Communications in Informal Rulemaking Proceedings, 30 Ad.L.Rev. 377 (1978).

[FN56] Administrative Conference of the United States, Ex parte Communications in Informal Rulemaking Proceedings Recommendation 77-3 (1977).

[FN57] ACUS Rec. 77-3.

[FN58] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), on remand 685 F.2d 459 (D.C.Cir.1982), reversed 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).

[FN59] See Sierra Club v. Costle, 657 F.2d 298, 391-392 (D.C.Cir.1981).

[FN60] E.g., FTC 94 Stat. at 379-380 (198W; FCC: 47 C.F.R. § 300.2 (1979); CPSC: 16 C.F.R. Pt. 1012 (1979).

[FN61] Sierra Club v. Costle, 657 F.2d 298, 395-396 (D.C.Cir.1981 ).

[FN62] United Steelworkers of America v. Marshall, 647 F.2d 1189, 1215 (D.C.Cir.1980), cert. denied 453 US. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981).

[FN63] Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305, 1308-1309 (D.C.Cir.1977).

[FN64] Hercules, Inc. v. EPA, 598 F.2d 91 (D.C.Cir.1978).

[FN65] 41 Fed.Reg. 17899 (1976).

[FN66] 598 F.2d at 124.

[FN67] 598 F.2d at 125-127.

[FN68] 598 F.2d at 127.

[FN69] 598 F.2d at 127.

[FN70] 598 F.2d at 127.

[FN71] E.g., 1981 MSAPA, 15 U.L.A. I, § 4-213 (1981).

2 Admin. L. & Prac. § 6.12 (2d ed.)

[FN72] Arkansas Appraiser Licensing & Certification Bd. v. Fletcher, 326 Ark. 628, 933 S.W.2d 789, 790—91 (Ark. 1996).

[FN72.1] Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62, 72 (1997).

[FN72.2] 492 S.E.2d at 72 (citing Grolier, Inc. v. Federal Trade Commission, 615 F.2d 1215 (9th Cir.1980)), appeal after remand 699 F.2d 983 (9th Cir.1983), cert. denied 464 U.S. 891, 104 S.Ct. 235, 78 L.Ed.2d 227 (1983).

[FN72.3] 492 S.E.2d at 72.

[FN72.4] 492 S.E.2d at 74 (citing Burgess v. Stem, 311 S.C. 326, 428 S.E.2d 880 (1993), cert. denied 510 U.S. 865, 114 S.Ct. 186, 126 L.Ed.2d 145 (1993)).

[FN72.5] Grimes v. Conservation Commission of the Town of Litchfield, 243 Conn. 266, 703 A.2d 101, 106, n. 12 (1997) (citing Jarvis Acres, Inc. v. Zoning Commission, 163 Conn. 41, 47, 301 A.2d 244, 247 (1972); Winslow v. Zoning Board, 143 Conn. 381, 388, 122 A.2d 789, 793 (1956); Blaker v. Planning & Zoning Commission, 212 Conn 471 473, 562 A.2d 1093, 1094 (1989), appeal after remand 219 Conn. 139, 592 A.2d 155 (1991)).

[FN72.6] Worman Enters. Inc. v. Boone County Solid Waste Mgmt. Dist., 805 N.E.2d 369 (Ind.2004).

[FN72.7] Miller v. Workforce Safety and Ins., 2006 ND 1, 707 N.W.2d 809, 811-13 (N.D. 2006).

[FN73] Arthur Bonfield, State Administrative Rulemaking, 331 (1986).

[FN74] Bonfield, at 333.

[FN75] Antonin Scalia, Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking, 1 Regulation 38, 41 (July-Aug. 1977).

[FN76] Arthur Bonfield, State Administrative Rulemaking, 340 (1986).



ADMLP § 6.12

END OF DOCUMENT

EXHIBIT 12

Start Time: 10:00
End Time: 3:30

**In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Policies**
**Roundtable Discussion**
**4th Floor Conference Room**
**10 am – 3 pm**
**Sign-In Sheet**

| Name of Participant | Title or Affiliation |
|---|---|
| Kevin K. Zarling | Senior Counsel, Empire |
| John Idoux | EQ |
| Craig Johnson | Attorney |
| Lisa Langeneckert | MO Energy Group |
| Paul Boudreau | |
| Russ Mitten | Bryan Cave for Empire |
| Steve Kidwell | Ameren UE |
| Jim Lowery | Smith Lewis, LLP |
| Gaye Suggett | Ameren UE |
| Ken Schifman | Sprint Nextel |
| BRIAN McCARTNEY | BRYDAN, SWEARENGEN & ENGLAND P.C. |
| TRIP ENGLAND | " |
| Jim Fischer | F & D |

Start Time: _____
End Time: _____

| Name of Participant | Title or Affiliation |
|---|---|
| Denny Williams | Aquila |
| Curtis Blanc | KCPL |
| Lisa Maya | Stop Aquila/Citizen |
| Lewis Mills | OPC |
| Janet E. Wheeler | PA / C. Jarrett |
| Bob Gryzmala | AFT Mo. |
| STU CONRAD | FCP |
| K. Thompson | PSC - GCO |
| Diana Vuylsteke | MIEC |
| WESS HENDERSON | PSC |
| David Woodsmall | FCP |
| Natelle Dietrich | PSC |
| | |
| | |
| | |
| | |

Start Time: _____
End Time: _____

| Name of Participant | Title or Affiliation |
|---|---|
| Julie Noonan | Citizen-Member StopAquila.org |
| Warren Wood | MEDA |
| John Coffman | AARP; Consumers Council of Mo. |
| Craig Unruh | AT&T |
| STEVEN DOTTHEIM | MoPSC STAFF |
| Ric TELTHORST | Mo Telecom Ind Assoc |
| Robert Boone | MoPSC STAFF |
| ROBERT CLAYTON | PSC |
| TOM BYRNE | AMEREN UE |
| Matt Kay | Socket Telecom |
| Joe Bedan | |
| Larry Plous | Laclede Gas |
| Mike Cadergast | " |
| Becky Owenson Kilpatrick | Century Tel |
| Mike Noack | Missouri Gas Energy |
| Scott Keith | Empire District |

# BEFORE THE PUBLIC SERVICE COMMISSION
# OF THE STATE OF MISSOURI

| | | |
|---|---|---|
| In the Matter of a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute | ) ) ) | **Case No. AO-2008-0192** |

## PUBLIC COUNSEL'S RESPONSE TO REQUEST FOR FILING

COMES NOW the Office of the Public Counsel and for its Response to Request for Filing states as follows:

1. At the roundtable meeting on January 7, Chairman Davis asked that the specific portions of the Slavin[1] case that refer to a PSC Commissioner's compliance with the standards of judicial conduct be filed.

2. There are two such passages: "However, the courts in this state have held officials occupying quasi-judicial positions to **the same high standard as apply to judicial officers** by insisting that such officials be free of any interest in the matter to be considered by them" and "It is clear from King's Lake, Forest Hills Utility Company, and American General Insurance that **the same standards and rules apply to quasi-judicial officers** as to judicial officers."[2] The Slavin court could have limited its decision by simply saying that a quasi-judicial officer shall not participate in a case in which she has a specific interest, but it did not. The Slavin decision speaks much more broadly of applying the "same [judicial] standards and rules" to PSC Commissioners as are applied to judges.

WHEREFORE, Public Counsel respectfully submits this Response to Request for Filing.

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[1] Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979)
[2] Ibid., at 137 and 139.

Respectfully submitted,

OFFICE OF THE Public Counsel

**/s/ Lewis R. Mills, Jr.**

By:_____

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 10th day of January 2008:

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